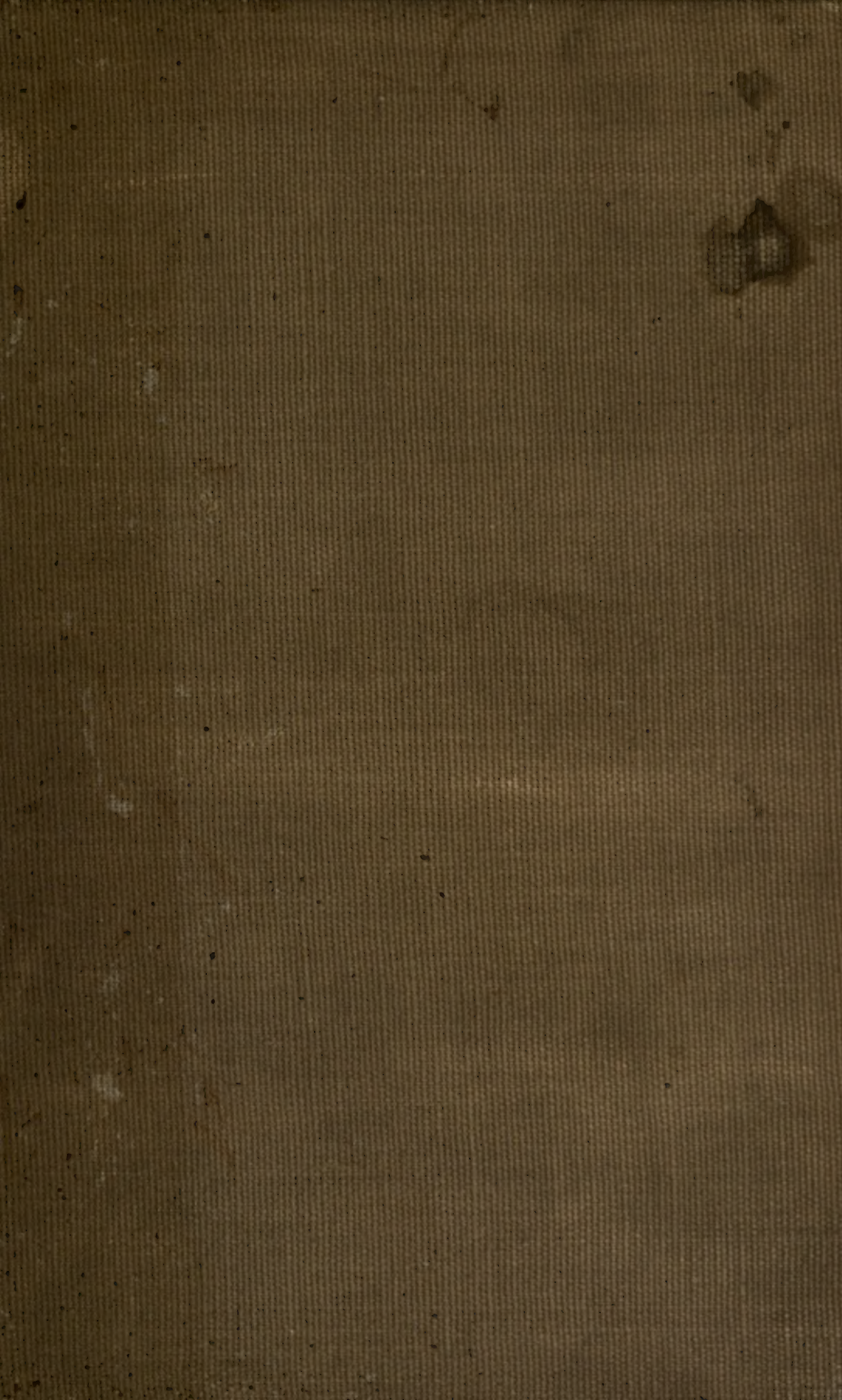






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BUSINESS LAW

FOR

BUSINESS MEN

COVERING ALL THE STATES AND
TERRITORIES IN THE UNION

PREPARED ESPECIALLY FOR BUSY LAYMEN

— BY —

UTLEY E. CRANE, LL.B., B.S.

Member of the Philadelphia Bar

THE JOHN C. WINSTON COMPANY
PHILADELPHIA

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1911

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PREFACE

THE standard text books on Commercial Law have invariably been designed for use in business colleges and commercial law schools, and have been limited in scope to an exposition of the legal principles involved in ordinary mercantile transactions.

Recognizing that the average business man has neither the opportunity nor inclination to pursue a systematic study of business law, this work had been specially prepared to meet the requirements of the busy man of affairs. Omission of any citation of authority and all legal technicalities has been for the purpose of rendering the work interesting as well as instructive.

It has been the author's endeavor to present a concise and lucid statement of every essential requirement of the law appertaining to the manifold relationships incident to modern commercial enterprise.

It is, moreover, incumbent upon the average layman to possess an accurate conception of his legal rights and obligations in other than the mere commercial relations of life. The industrial tendencies of the present age have made the enactment of numerous statutes, regulating corporate and interstate business, imperative. The law of common carriers, anti-trust legislation and kindred topics constitutes an important feature of this book. Furthermore, the additional inclusion of such subjects as the law of domestic relations, business crimes and misdemeanors, executors, administrators and trustees, building and loan associations, the law of architects and builders, patents, trade marks and copyrights, etc., makes this book both unique and indispensable.

Numerous legal business forms will, it is thought, be of practical value to every business man.

UTLEY E. CRANE.

12/15/1915

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BILL OF SALE

Know all Men by these Presents, That

of
to *for and in consideration of the sum of*
in hand paid by
of

at or before the sealing and
delivery of these presents, the receipt whereof is hereby acknowledged,
have granted, bargained, sold and delivered, and by these presents
do grant, bargain, sell and deliver unto the said

all and singular the

mentioned in the Schedule hereunto annexed, and marked
with the letter A:

To have and to hold *the said*

unto the said

heirs, executors, administrators and assigns, to and for
own proper use, benefit and behoof forever.

AND *the said*

heirs, executors and administrators, the said

unto the said

administrators and assigns, from and against all persons whom-
soever, shall and will Warrant and forever Defend by these presents.

In witness whereof, *have hereunto set*
hand and seal the *day of* *in the year*
of our Lord one thousand nine hundred and

Scaled and Delivered {
IN THE PRESENCE OF US: {

On the day of the date of the above Bill of Sale, livery of seisin
of the articles mentioned in the Schedule above referred to, was given
by the said
to the said *in the presence of us,*

The *day of* *A. D. 19* *personally*
appeared before me,
the above-named
and acknowledged the foregoing instrument to be *act and deed,*
and desired the same might be recorded as
such, according to law.

WITNESS my hand and seal.

(Follow with Inventory referred to in the foregoing Bill of Sale.)

MACHINERY LEASE

Agreement, Made the _____ day of _____, 19____, between _____ of _____, of the first part, manufacturer, and _____ of _____, of the second part, mill owner. The said parties mutually agree as follows:

1. In consideration of the payments hereby reserved, and of the performance of the conditions and stipulations hereinafter contained, and on the part of the said party of the second part to be performed, the said party of the first part will, on or before the _____ day of _____ next, erect and place in the mill of the said party of the second part situated at _____, in the county of _____, the steam engines, machinery, apparatus, and plant particularly described in the schedule hereto annexed, and hereafter called the said machinery.

2. The said party of the second part shall hold and be at liberty to use the said machinery for the term of _____ years from the said _____ day of _____ next, at the rent of _____ dollars per annum, payable half-yearly on the _____ day of _____, and the _____ day of _____, in each year during the continuance of the said term, such payments making in the aggregate the sum of _____ dollars (price of the machinery), the first of such payments to be made in advance on the said _____ day of _____ next.

3. The said party of the second part shall, at his own expense, from time to time, replace and repair all such parts of the said machinery as may be broken, worn out, or damaged, and keep the same in every respect in good working order; and he will not, during the said term, remove any part of the said machinery from the building where the same may be erected without the consent in writing of the said party of the first part and will not assign, transfer, underlet, or part with the possession of the same either directly or indirectly.

4. The said party of the second part will punctually pay the rents hereby reserved, and perform all the conditions and stipulations herein contained, and on his part to be performed; and will not do or suffer anything whereby the said machinery or any part thereof shall or may be seized, taken in execution, attached, removed, destroyed, or injured.

5. The said party of the second part shall keep said machinery insured against damage or loss by fire in some office to be approved by the said party of the first part, for at least the sum of _____ dollars, and will pay the premiums for such insurance, and will forthwith deliver to the said party of the first part the policies of such insurance, and the receipts for the premiums which shall become payable therefor.

6. It is hereby expressly declared that the property in said machinery shall remain in the said party of the first part to all intents and purposes: provided, that the said machinery shall become the absolute property of the said party of the second part on the expiration of the said term, and payment of all the rent hereby covenanted to be

paid, and all costs, charges, and expenses provided for under this agreement.

7. In case of the bankruptcy of the said party of the second part, or in such case he shall assign, transfer, or mortgage the said machinery, or any part thereof, or in case he shall make default in performing and observing any of the covenants, conditions, or agreements herein contained, the said aggregate sum of dollars shall become immediately payable to the said party of the first part, and he may at his option enter said premises, and every building in which any part of the said machinery may be, and take possession of and remove the said machinery, and may, without the consent of the said party of the second part, sell the same as freely as if this agreement had not been made and retain amount due, paying surplus to mill owner.

In witness, etc.

GENERAL RELEASE

Know all Men by these Presents, That I, _____,
of _____, do hereby remise, release, and forever discharge
of _____, his heirs, executors, and administrators,
of and from all and all manner of actions, and causes of action, suits,
debts, dues, accounts, bonds, covenants, contracts, agreements, judgments,
claims, and demands whatsoever in law or equity, which
against the said _____ I ever had, now have, or which my heirs,
executors, administrators, or assigns, or any of them, hereafter can,
shall, or may have, for or by reason of any cause, matter or thing
whatsoever, from the beginning of the world to the date of these presents.

In Witness Whereof, I have hereunto set my hand and seal the
day of _____, 19 ____.

APPRENTICE AGREEMENT

This Indenture WITNESSETH THAT

by and with the consent of
 hath put himself, and by these presents doth voluntarily, and of his
 own free will and accord put himself Apprentice to
 to learn the art, trade and mystery of
 and after the manner of an Apprentice to serve the said
 from the day of the date hereof, for and during the term of
 years months days ending on the day of
 19 , next ensuing.

During all of which time the said Apprentice doth covenant
 and promise that he will serve the said
 faithfully, keep secrets, and obey lawful commands;
 That he will do no damage himself, nor see it done by others, without
 giving notice thereof; that he will not waste goods, nor
 lend them unlawfully; that he will not contract matrimony within
 the said term; that he will not play at cards, dice, or any other unlaw-
 ful game whereby his employers interests may be injured; that he will
 neither buy nor sell with his own goods or the goods of others, without
 license from his employer ; that he will not absent himself day or
 night from his employers service, without leave, nor haunt ale-houses,
 taverns, or play-houses, but in all things behave himself as a faithful
 Apprentice ought to do, during the said term. And the said
 on part, doth covenant and promise,
 that will use the utmost of endeavors to teach or cause to
 be taught and instructed, the said Apprentice in the art, trade, or
 mystery of
 and will procure and provide for him sufficient meat, drink, clothing,
 lodging, washing and mending fitting for an Apprentice, during the
 said term, and will give him schooling during the said term

And for the true performance of all and singular the covenants
 and agreements aforesaid, the said parties bind themselves each unto
 the other, firmly by these presents.

In Witness Whereof, the said parties have interchange-
 ably set their hands and seals hereunto. Dated the
 day of in the year of our Lord one thousand
 nine hundred and

Sealed and Delivered
IN THE PRESENCE OF US:

}

L.S.

L.S.

L.S.

CONTRACTS

Law Classified—Objects of Law—Formation of Contracts—Capacity of the Parties—Offer and Acceptance—Form and Consideration—Reality of Consent—Legality—Operation—Interpretation—Discharge.

THE subject of commercial law, involving the rules of action governing every variety of dispute arising out of mercantile transactions, is one of constantly increasing importance, in view of the diverse complications incident to the expansion of commercial activities. A general knowledge of that science which constitutes the guardian of a man's natural rights and the rule of his civil conduct should, therefore, form a very useful part of every liberal education and be of invaluable assistance in every-day business life.

As a necessary introduction to the study of commercial law, it will conduce to a clearer understanding of the subject to consider briefly the origin, object and classification of law in general.

Law has been defined to be a rule of action prescribed by a superior power. Thus when God created the world out of chaos, he impressed upon matter certain principles (laws) which are immutable, governing both the animate and inanimate universe. We are concerned, however, not with physical or mechanical laws, but only with the rules or laws of human action or conduct. Man, being divinely endowed with reason and will power, is enabled to distinguish between what is right and what is wrong, and to act accordingly. Originally there was no necessity for the existence of any law other than natural law, but as the population increased, it became imperative for the protection of life, liberty and property for society to regulate the rights of its members by a system of laws which we call municipal law.

Law Classified.

Law may be conveniently classified under the four following divisions: Natural or moral law, divine or revealed law, international law and municipal law.

Natural law consists of that body of law appertaining to man in a state of nature, viz., the right to live and enjoy personal security and private property. The divine or revealed law

consists of the rules of action revealed by God to man through the medium of specially-chosen and inspired men. Throughout Christendom this revealed law is contained in the Holy Scriptures. In Oriental countries, where different religious beliefs prevail, the source of the revealed law depends upon the religion followed in each particular country, the Mohammedans looking to the Koran, the Chinese to the writings of Confucius, the people of India and Japan to the writings of Buddha. Although very few obey the divine or revealed law in all of its high requirements, it doubtless exercises a far more potent influence upon the actions of men than any system of human laws ever promulgated, which, however, usually conforms therewith. International law comprises the rules of action adopted by independent nations to regulate the relations between them. Municipal law is defined to be "a rule of civil conduct prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong," being applied to the laws of a State or Nation as well as those of a municipality. It is to be observed that municipal law does not attempt to punish every wrong, but only in so far as such wrong affects or interferes with the rights of others, taking cognizance only of concrete actions. Thus a man may be as morally depraved as possible, nevertheless municipal law will not interfere with him unless such moral obliquity results in some positive injury to another.

Municipal law is composed of both the written law (*lex scripta*) and the unwritten law (*lex non scripta*).

The written law comprises the laws or statutes enacted by the legislative body of the State, as, for example, the acts of Parliament in England, the acts of Congress in this country, the acts passed by the several State Legislatures and borough or city ordinances. The written or statutory law is either declaratory of the common law, i. e., made for the purpose of rendering more definite the principles thereof, or is enacted for the purpose of changing the common law to meet the exigencies that arise with advancing civilization.

The unwritten law, which is by far the most extensive branch of jurisprudence, is divided into two divisions, to wit, the civil law and the common law.

The civil law is that system of law under which the greater part of Continental Europe is governed, its foundation dating from the Tarquinian Kings of Rome and being gradually developed until the downfall of the Roman Empire. This body of laws, consisting of the edicts of the Roman Kings, Emperors and

Senate, together with the opinions of men learned in the law, was classified and embodied in a code by the Roman Emperor Justinian, which compilation of laws is known as the Justinian Code. This code was at a much later date revised by Napoleon I, the Code Napoleon being used in France to-day, and, with certain modifications, in Germany, Holland, Spain and Italy. The civil law, although radically different from our own system, has exercised considerable influence upon it, being introduced into England in 1066 by William the Conqueror. The fact that Louisiana and the greater part of our territory recently acquired from Spain is governed largely by the civil law, makes its study a matter of considerable present interest.

The Common Law, which is that beneficent system of laws in force throughout England and the United States, was brought here by our English ancestors and had its origin in ancient customs and usages. In earliest antiquity, before any necessity arose for the organization of Courts of Justice, disputes between man and man were settled entirely according to custom. If it was usual to follow a particular course of action under certain circumstances, such a course of action became custom and would regulate all subsequent situations of a similar character, and anyone undertaking to follow a different course of action than that dictated by custom would meet with the opposition of the public and would be compelled to acquiesce in the custom, which eventually became the law. When Courts of Justice were established, these customs were recognized as the law of the land, but to become law it was necessary for a custom to have existed, to use a familiar phrase, "from a time whereof the memory of man runneth not to the contrary." These customs, of course, would vary in different communities and consequently widely different and conflicting customs existed in different parts of England, which, up to the time of Alfred the Great, was divided into a number of small kingdoms, each observing its own particular customs or laws. King Alfred the Great, however, among his many other useful labors, undertook to digest the customs prevailing throughout his kingdom for the purpose of facilitating the administration of justice, which work constitutes the foundation of that great system of laws which regulates every English-speaking country to-day. After the organization of Courts of Justice became general, if a particular dispute arose between two individuals, to settle which no custom could be found, the Judge before whom the case was tried would himself decide the case, stating the reasons for his decision, which would constitute a

precedent to govern any subsequent dispute involving the same point or points. The multitude of these decisions, the reports of which fill thousands of volumes, forms the body of our common law, and unless such opinions are reversed by an Appellate Court, they are binding upon all Courts within the same jurisdiction, subject to the limitation that they must not contravene the provisions of either the State or Federal Constitution.

Objects of Law.

Having ascertained briefly the manner in which law is formed, we will next direct our attention to an inquiry into the general objects of law. The objects of law are (1) the protection of rights and (2) the redress of wrongs. Law which sets forth the rights possessed by man and what constitutes an infraction of those rights, comprises what is known as the Substantive Law. That branch of law providing the methods whereby wrongs are redressed is known as the Remedial Law.

Substantive law, as above indicated, relates to rights which the law recognizes and will enforce and such legal wrongs for which the law provides redress. Now rights may be subdivided into the rights of persons, being such rights as are annexed to the person of man, as distinguished from rights appertaining to property, the rights of persons including the rights growing out of relation of master and servant, the marital relation, guardian and ward, as well as the rights and liabilities of corporations. The law regulating the rights of things defines the rights incident to the acquisition and ownership of property both real and personal.

Referring to the second division of substantive law, wrongs are of two kinds: First, wrongs which affect the entire community, known as public wrongs, commonly called crimes; and, secondly, wrongs which affect an individual only, known as private wrongs, in legal parlance referred to as torts.

We observed above that remedial law (the second general division of municipal law) was that branch of jurisprudence which provided the means whereby wrongs may be redressed. This purpose is accomplished by two methods, either by application to what are known as common law Courts, which were the oldest Courts organized in England, being rigidly bound by common law precedents, or by application to a Court of equity upon purely equitable principles. Courts of equity were organized for the purpose of administering exact justice between litigants whose rights would otherwise be prejudiced in a common law

Court by virtue of its limitations, being bound, as above noted, strictly by precedent, the object of a Court of equity being to apply conscience to questions in controversy, rather than mere formal rules from which a common law Court cannot deviate and which frequently fall short of doing complete justice. In Pennsylvania we have no separate Courts of equity, our Common Pleas Courts administering equitable principles through common law forms.

In the early ages land was practically the only property of value, and naturally the law first developed was that relating to real estate. However, when it became impossible for everyone to earn a livelihood through the tillage of the soil, and the fine arts and mechanical trades were developed, the law applicable to personal property acquired transcendent importance, the value of personal property rising, as Chancellor Kent observes, superior to real property in its influence over the talents, passions and destiny of mankind. In the pursuit of trade, the necessity of compelling men to fulfil their agreements gave rise to the law of contracts. As commerce developed and expanded into foreign countries it became necessary for a man to conduct his business through the agency of another, which gave rise to the law of agency. When it became inconvenient to make payment in currency for obligations contracted, to facilitate freedom of exchange, negotiable instruments came into vogue. Furthermore, the expediency was soon recognized of combining capital and labor for the promotion of commerce, and consequently the law regulating business associations, such as partnerships, corporations and joint-stock companies has assumed a foremost place in modern jurisprudence.

With the foregoing very brief synopsis of the origin, object and classification of law, it is hoped that the reader will be better able to follow the subjects to be included in the present course.

Contracts.

Inasmuch as the law of contracts in its several phases enters into practically every business transaction, this subject should naturally receive consideration first, particularly as every department of commercial law is, to a greater or less extent, referable to the theory of contract law.

Let us at the outset clearly understand what is meant by a contract. If A agrees to sell to B 100 barrels of sugar, which B agrees to buy, this contract confers certain rights upon both par-

ties, the right of A to receive payment upon delivery of the sugar and the right of B to have A furnish him the same upon payment of the stipulated price. The relation between A and B constitutes what is known as a contract. Every contract includes two elements—(1) agreement and (2) obligation. A mere agreement between two or more parties does not in itself constitute a contract; thus an agreement to keep a social engagement will not amount to a contract, because it is necessary that mutual obligations be imposed upon the parties in order to create a contract, which obligations are enforceable at law. To make an agreement which results in a legal contract there must be two or more parties having legal capacity to make a contract, and the agreement which imposes mutual obligations upon them must be definitely expressed. Such expression of intention must consist of a definite offer made by one party, which is accepted by the other. Furthermore, such an agreement must either be expressed in a particular form, i. e., it must either be made under seal, or there must be a consideration to support the agreement, the significance of which we will be able to understand more fully hereafter. Again, the expression of agreement must not be the result of fraud, deceit or coercion, it being necessary that the agreement entered into must be *bona fide*. Lastly, the object of the agreement must not conflict with either the statute law or common law of the State, or be opposed to any rule of public policy.

We are now in a better position to define a contract, which may be said to be an agreement, enforceable at law, made between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other.

The subject of contracts may be considered under the four following divisions: (1) The formation of a contract, involving a consideration of how a contract is made; (2) the operation of a contract, viz., when made, whom does it affect; (3) the interpretation of a contract, which includes (a) the evidence required to prove its existence, and (b) the construction placed by the Courts upon its terms; and (4) the discharge of a contract, or how the relation established by a contract may be terminated.

The Formation of Contract.

The essential elements entering into the formation of every valid contract will be considered with reference to:

1. The capacity of the parties to make a contract.
2. The communication by the parties of their intention by an offer and acceptance.
3. The form and consideration required by law as evidence of the intention of the parties to effect their legal relations.
4. The reality of the consent embodied in the agreement of the parties.
5. The legality of the objects sought to be effected by the contract.

The discussion of the capacity of the parties to make a contract involves in reality a consideration of the various disabilities which render certain classes of people incapable of binding themselves by a promise or of enforcing a promise made to them, being exceptions to the general rule that anybody may bind himself by a contract.

The principal disabilities disqualifying a man from entering into a contract relate to infancy and lunacy, the common-law restriction against the contractual capacity of married women being largely removed by statute, so that to-day a married woman has the same right to contract as any other individual, with the exception that she cannot become an accommodation indorser, guarantor or surety for another.

It is a well-established rule of common law that no one under the legal age of majority can enter into a contract that will be binding. The age of majority in Pennsylvania is twenty-one years in both males and females, although in several of the States the age of majority in the female is reached at eighteen. Majority is reached on the first minute of the day preceding the twenty-first birthday.

If a contract is entered into by a minor, the contract is not necessarily void, but remains in suspense, as it were, the minor having the right to ratify the contract upon attaining his majority, or he may repudiate his contract at any time during minority, or upon reaching the age of twenty-one years, or within a reasonable time thereafter; otherwise he will be deemed to have impliedly ratified the contract. For example, A being a minor, say twenty years old, purchased an automobile, agreeing to pay therefor the sum of \$2,500; the automobile is accidentally destroyed, whereupon the infant decides to repudiate his contract. The seller of the machine has no redress whatever, as the contract was not binding upon the minor. If, however, the machine had not been destroyed, the vendor could recover its possession upon refusal of payment, or, if wilfully destroyed,

could obtain compensation in damages under certain circumstances, or the vendor of the machine could have the minor arrested for a misdemeanor, but no action *ex contractu* would lie on account of the contract having been made with a minor.

A minor must, upon reaching the age of twenty-one years, either repudiate or ratify his contract, when it will date back to the time of the original agreement. If the contract of an infant has been executed during minority, it will be necessary for the infant to repudiate his bargain within a reasonable time after reaching his majority, otherwise the contract will be deemed to have been ratified. If, however, the contract at the time the infant attains his majority remains executory—that is, if neither party has performed his part of the agreement—the contract is deemed to have been repudiated unless the minor takes positive steps to ratify the contract promptly. This is an important distinction which should carefully be borne in mind.

There are two classes of contracts into which a minor may enter which will be binding upon him, the exceptions being contracts for necessities and marriage contracts, the latter class of contracts being subject to certain limitations, which it is unnecessary to discuss in a course of this character.

The law holding a minor responsible on account of his contracts for necessities is made for the benefit and protection of the minor, who otherwise might be unable to obtain the necessities of life in the midst of plenty. An important question arises in this connection in regard to what constitutes necessities. This depends entirely upon the station or position in life occupied by the infant. Ordinary articles of wearing apparel, lodging and board, educational and medical expenses, etc., are generally regarded as necessities for which an infant is bound to pay. A salesman should always be on his guard when dealing with an infant. Articles which would be regarded as necessary for a university student would not be considered necessary in the case of a plumber's apprentice. Every case depends upon its own particular circumstances, and a Court is inclined to regard as necessities only such articles as are essential to the comfort of the infant, taking into consideration the infant's position in life.

Contracts of Persons Non Compos Mentis.

A Court of Law will further protect all persons of unsound mind from the effect of contracts entered into by them; but, as in the case of minors, there are certain exceptions to the gen-

eral rule. Let us ascertain, therefore, how far this protection extends.

If at the time of entering into a contract one of the parties thereto was incapable of understanding the purport of his act, which fact was known to the other party to the contract, it would not be binding upon the lunatic. In Pennsylvania the law is well settled that the contract of a lunatic is not binding upon him if the other party knew of his insanity, or if it had been judicially declared that the party was insane. A temporary loss of reason will not, however, affect a contract made during a lucid interval. One who entered into a contract while insane may upon regaining sanity ratify his act. A lunatic is bound by his contracts for necessities, as in the case of infants.

Intoxication, depriving a man temporarily of his reason, is another defense frequently set forth in an action on a contract, and the law will not tolerate advantage being taken of a man sufficiently under the influence of liquor as not to be sensible of his acts. A contract made by an intoxicated person may subsequently be avoided or affirmed by him, but, as there are several degrees of intoxication, a Court is very loath to allow a man to avail himself of this defense unless he can clearly establish that he was unable to transact business at the time the contract was made.

The two remaining exceptions to the rule that everybody may enter into a contract apply to alien enemies and corporations. Alien enemies have no standing in our Courts, and consequently their contracts are unenforceable. A corporation cannot enter into a contract not germane to the business authorized by its charter, such contracts being *ultra vires* and void.

Offer and Acceptance.

In order to create a contract there must be a definite expression of the agreement between the parties thereto. This expression of agreement consists in an offer made by one party which is accepted by the other, and is ultimately reducible to question and answer. If A agrees to purchase from B a property worth \$10,000, the agreement can be traced to a moment when B said to A, "Will you buy my property for \$10,000?" and A replies, "I will." If you take up a book or other wares from a tradesman without making any agreement as to the price, the tradesman in displaying his wares says in reality, "Will you buy my goods at my price?" and you by taking them promise to do so, and hence become liable to pay therefor.

It should be carefully borne in mind that if either the offer or acceptance is indefinite, in other words, if the minds of the contracting parties do not meet by entertaining a common intention with reference to their agreement, no contract is created. For example, if A, who owns two automobiles, should say to B, "I will sell you either of my machines for \$2,000," and B replied by saying: "I accept your offer," there would be no contract between them because the acceptance was indefinite. If, however, B in accepting A's offer indicated the particular machine he desired to buy, the contract would be valid. It can therefore be laid down as a general rule that if an offer is made in the alternative the acceptance must indicate which alternative is accepted, in order to make a binding contract.

It is necessary, however, that an offer be free from all ambiguity, otherwise even a definite acceptance will not create a contract. A writes a letter to B stating: "We have a few cars of bituminous coal which we would be willing to sell you," naming a price. B replied, "I accept and will take fifty cars." Query: Has a contract been made between A and B? In this illustration no contract is created, for the reason that A did not offer to sell any specific number of cars, "a few cars" being very indefinite. Presuming A only had twenty-five cars, it is clear that he would not be liable on his offer for a greater number. Consequently B, by ordering a certain number without knowing how many were included in A's offer, could not hold A liable for breach of contract. A careful business man will always observe the necessity of seeing that both the offer and acceptance are definite in their terms.

Let us next consider the manner in which an offer and acceptance may be made. A contractual relation may be entered into either by words or conduct. If A asks B to work for him for hire, by merely doing the work, B accepts A's offer and is entitled to be paid for his services. As a matter of fact, if A merely permits B to do certain work for his benefit under such circumstances that no reasonable man would suppose that B was doing the work for nothing, A would be liable to pay therefor. The doing of the work is the offer, the permission to do it or the acquiescence in its being done is the acceptance. Upon the same principle, if A delivers certain goods to B's residence which goods B accepts and uses, B will be liable to pay what the goods are worth.

The offer and acceptance must not only be definite, but the acceptance is required to be unconditional and identical with the terms of the offer. To illustrate this principle, if A should offer

to sell B a certain piece of property for a certain sum, and B should reply by stating, "I will accept upon terms to be agreed upon later," no contract would be made because B's acceptance, which included a condition, was not absolute. Similarly, if a party in accepting an offer to purchase a bill of goods stipulates the manner in which payment is to be made, there would be no contract, on account of the attempt to introduce new terms into the agreement through the acceptance, which in reality would be making a new offer.

Although a definite offer must be made by an ascertained person, it need not be made to any particular individual, but may be made to the public in general. However, to form a contract, such offer must be accepted by a definite or particular person. A newspaper advertisement offering a reward for the return of a lost article or for the arrest and conviction of a criminal is an instance where an offer is made to the public in general. The contract is not completed, however, until an ascertained person accepts, which is done when the lost article is returned or the criminal arrested and convicted.

Suppose, however, that a person performs an act contemplated in the offer of a reward, but in ignorance of the offer; can such person recover the reward? There is considerable conflict of authority upon this point, but it is fairly well settled that the reward cannot be recovered because a man cannot accept an offer regarding the terms of which he was ignorant, which appears to be eminently logical.

Before a contract is complete the acceptance must be communicated to the offeror (the party making the offer). Considerable litigation has arisen when, through the fault of neither party, the acceptance never reaches the offeror. It, therefore, becomes important to ascertain when an acceptance is communicated in a manner to make the contract binding. The rule may be stated to be that the contract is complete at the time when the offeree (the party to whom the offer is made) accepts the offer in the manner indicated by the offeror, it being immaterial whether or not the acceptance actually reaches the latter. To more fully understand this statement of law, consider the following illustration: A, an insurance company, makes an offer to insure B's property on January 1, 1907. On January 15, B accepts A's offer by letter, inclosing a check covering the first premium. The letter of acceptance reached the office of the company on January 17, whereas on January 16 B's property was completely destroyed by fire. In this case, if the contract was

complete when the letter of acceptance was mailed, the insurance company would be liable on the policy; if not complete until January 17, the date the acceptance was received by the company, the loss would fall on the owner of the property. The Courts have decided that the mailing of the letter of acceptance closed the contract, and that consequently the company was liable for the loss.

The above stated rule frequently operates as a hardship upon the offeror, as is shown by the case where A offers to sell B a certain quantity of lumber for so much per thousand feet, which offer B immediately accepts by letter, which miscarries in the mails. A not having heard from B, concludes that he does not want the lumber, and forthwith sells the same to C. B, having accepted A's offer, relies upon him to carry out his contract. This case presents a very interesting situation, but it is well settled that the party making the offer is responsible for any miscarriage of the acceptance, because the offeror is the one who voluntarily acts, and, therefore, he assumes the risk that an acceptance communicated in a regular manner, or any special manner indicated by him, will reach him.

If, on the other hand, instead of the letter of acceptance being delayed, the letter containing the offer is postponed in delivery, a somewhat different situation arises. If the commodity sought to be sold is of a perishable nature, a duty is imposed upon the offeree to observe the date of the letter containing the offer. If the letter is not received for a considerable time after its date, an acceptance will not be binding upon the offeror.

We have observed that the offeree is bound to accept the offer in the manner indicated by the offeror. A, being a feed dealer, sent a message to B offering to sell him feed, requesting that an answer be sent back to him by A's delivery wagon. B, thinking the acceptance would be received sooner by mail, mailed his acceptance. The delivery wagon returned first, however, and A, not receiving a reply in accordance with the offer, sold the feed to C. B, having disregarded A's instructions, could not recover on the contract. His acceptance should have been sent back with the delivery wagon, the rule being that where the offeror indicates a special manner in which the offer shall be accepted, the acceptance to be binding must be made accordingly. The postoffice is the ordinary means of communication, and every person who gives another the right to communicate with him gives him the right to communicate with him in the ordinary manner. Hence, when a man posts a letter containing an ac-

ceptance of an offer he has accepted in the ordinary manner, and the contract is complete at that moment.

The above-stated rule that the mailing of a letter of acceptance concludes the contract is subject to an important qualification. If, after mailing his acceptance, the offeree decides to revoke the same he may do so, provided his revocation reaches the offeror before his letter of acceptance is actually received. The mailing of the letter of acceptance, as we have learned, completes the contract, but only in so far as the offeror is concerned, the offeree not being bound until his acceptance is received by the offeror.

The offer may also be withdrawn at any time before the acceptance is made. You offer to sell me a certain article and grant me the privilege of considering the matter until a certain hour on the following day. At the time appointed I call upon you for the purpose of accepting your offer, but before I communicate my intention to you, you withdraw your offer. No contract would exist in this case, because no legal obligation is imposed upon a man by virtue of an offer made to another, and the offeror can always recall his offer any time before acceptance.

If no time is stipulated within which an acceptance must be made, the offer will lapse after the expiration of a reasonable time, which is determined according to the circumstances of the case. An offer also lapses upon the death of either party before acceptance.

A certain class of contracts are made by the delivery of a document stating the general terms upon which the party delivering it will enter into the proposed contract. If it is accepted without objection by the party to whom it is tendered, it is binding upon him whether or not he informs himself of its contents. This is an apparent exception to the rule that the parties must entertain a common intention with reference to the subject matter of their agreement. In the case of railroad and steamship tickets, etc., the terms of the offer are frequently not contained upon the face of the contract, and it is quite common for a man to overlook reading the terms and conditions thereof. To cover this class of cases, the law has been established to the effect that when a man accepts a document which purports to contain the terms of an offer, the acceptance thereof is an acceptance of all the terms and conditions contained upon it and he becomes bound thereby.

Having brought the contracting parties together by an agreement expressed in a definite offer and acceptance, further evi-

dence of the intention of the parties is yet required before an obligation will be recognized as lawfully binding upon the parties. To constitute a binding agreement, some consideration must be given as compensation for the promise contained in the contract, or certain solemnity must attach to the expression of intention to give effect to the contract, the latter requirement being complied with by making the contract under seal. In the early development of the Roman and English law, the form in which an agreement was expressed was the most important element. Originally the use of a seal was the only method whereby an executory contract could be made binding. Later the doctrine of consideration assumed predominant importance. Contracts are, therefore, divisible into two classes—(1) formal contracts, the validity of which depend upon the form in which they are expressed, and (2) simple contracts, the validity of which depend upon the presence of consideration.

Formal contracts are again divided into contracts of record and contracts under seal. The record of a judgment properly entered in a Court of Justice, the obligation being enforceable by order of the Court and requiring none of the characteristics of a contract, is what is known as a contract of record.

A contract under seal is one which has been reduced to writing and signed and sealed by either one or both of the contracting parties. In this class of contracts the party executing the contract must attach a seal opposite his signature. In olden times this seal consisted of a wax impression and is still used upon many deeds, wills and other important documents. No particular form of seal is necessary, a mere pen mark an eighth of an inch long having been decided by the Supreme Court of Pennsylvania to be a sufficient seal. If the contract concludes with the words, "Signed, sealed and delivered," or similar phraseology, any legible marks obviously intended to represent a seal will be sufficient. If a contract required or intended to be made under seal omits a proper seal, the contract will be treated as a simple contract and require a consideration to support it. A contract under seal is held binding in the absence of consideration on the ground that when a man places his seal upon a contract he does so only upon proper reflection and deliberation, which raises the presumption that he has received an adequate consideration for his act. The most important class of contracts that are valid only if made under seal comprises deeds for the conveyance of real estate, which must not only be signed and sealed, but also delivered before any rights are conferred by them. A deed or other

document delivered to a third party to hold pending the performance of certain conditions, upon which it is to be delivered to the party entitled thereto, is said to be in escrow.

We noted above that a mere gratuitous promise is not binding unless made under seal. The best illustration of such a promise is furnished in the case of a bond. A bond is a sealed instrument containing a promise to pay a stipulated sum of money, the effect of which ceases upon the performance by the party executing the bond of the condition or conditions contained therein. There are two general classes of bonds—(a) bonds executed for the faithful performance of duty, as in the case of a treasurer of a corporation, who gives a bond in a large sum of money, containing the proviso that if he faithfully performs the duties of his office the obligation contained in the bond is to become void; (b) bonds given to secure a debt. For example, suppose A owes B \$1,000, which he promises to pay by July 1, 1907. A, for the protection of B, executes a bond, obligating himself to pay \$2,000 (double the amount of the indebtedness), said bond containing the provision that if he satisfy the indebtedness on or before July 1, 1907, the bond is to become void. This bond is usually accompanied by a warrant of attorney, in which the party executing the bond authorizes the other party to enter judgment in any Court of record for the full amount of the bond, provided the obligation set forth therein is not fulfilled, which judgment can be executed upon the property of the party executing the bond. One should be very careful before giving a bond of this kind, as it is the most binding obligation to which a man can subject himself.

In addition to this class of contracts there are a great many contracts made under seal for the purpose of adding precision or extra solemnity to the transaction. This is done more frequently when doubt exists about the presence of consideration or where the consideration is desired to be kept secret. Contracts of any unusual importance should always be made under seal as a matter of precaution.

Consideration.

By far the most common and important class of contracts is the simple or patrol contract, which requires the presence of consideration to render the same valid. It is somewhat difficult to say how consideration came to form the basis upon which the validity of a contract not under seal is established. Courts of

equity not being bound by strict common law rules endeavored to find evidence of a man's intentions in the practical results to him of his acts or promises, and hence in the case of informal or patrol contracts, the question was asked, what advantage is gained or detriment suffered on account of the promise made, and if there was a *quid pro quo* for the promise, a consideration was said to exist, and the contract thereupon became enforceable.

Consideration is defined to be "any benefit to the promisor or any detriment to the promisee." The benefit must come from the party to whom the promise is made (the promisee); the detriment must be suffered by the party making the promise (the promisor). The simplest illustration of this definition is afforded by the case of a promise made by A to deliver to B one hundred bales of cotton for a stipulated price. The benefit accruing to A, which is necessary to give validity to this promise, is the price agreed to be paid by B. The detriment suffered by B consists in the fact that he must pay the price for the cotton. Thus it will be seen that the benefit, in the nature of the price paid by B, comes from the promisee, and the detriment imposed is the obligation to pay the price upon delivery of the bales of cotton. A promise in the eyes of the law is a detriment if it imposes legal responsibility upon the party making it. This doctrine of consideration is to-day applied to every contract, and may be said to form the foundation of our present law of contract.

The consideration may be either the doing of a present act, as, for example, the payment of a sum of money, or the promise to do a future act, such as a promise of marriage.

The consideration in a contract need not be commensurate with the benefit derived, a sufficient consideration existing if there has been some legal benefit enjoyed by one party and some legal detriment suffered by the other, however insignificant. The consideration must not, however, be so grossly inadequate to the benefit or detriment involved as to shock the conscience of a Court of Equity, in which event the consideration will be held invalid and the contract annulled. A agreed to loan B certain large boilers for the purpose of weighing them, B promising to return them to A in the same condition in which they were received. B takes the boilers apart in order to weigh them and returns them to A without putting them together. A brought suit against B for breach of contract, in that the boilers were not returned in good condition. B defended on the ground that there was no consideration for his promise to return them in proper condition. The Court held that B must have received

some benefit, otherwise he would not have taken the trouble of weighing the boilers, and furthermore that it was a detriment to A to part with their possession. The contract was decided to be a valid one and B was held liable for its breach. It should be borne in mind that the law will never attempt to rescue a man simply because he enters into a bad bargain. An illustration of this principle is furnished in the case of a man purchasing the patent rights of another. Suppose A agrees for a particular sum to purchase B's entire right, title and interest in and to certain letters patent, which turn out to be worthless in view of a subsequently discovered patent of a prior date. A, who obtained precisely what he bargained for, is bound by his contract, although the property in the patent was valueless. Hence it is always well to consider carefully a bargain before concluding it. A man by the exercise of a little forethought in these respects may avoid the otherwise disastrous consequences of contracts into which he may enter.

In connection with the subject of consideration it should also be noted that a consideration is void if based upon a promise to do an act impossible of performance.

Promises.

The existing liabilities of the contracting parties must also be taken into consideration in determining whether or not a *bona fide* benefit has been received by one party and a legal detriment suffered by the other. Thus, if a man is legally liable to do an act, a promise of its performance confers no legal benefit upon the party so entitled. For example, if I am indebted to you in the sum of \$5,000, which I have neglected to pay, and I finally come to you and promise to pay the debt in full, provided you will loan me your yacht for the summer, which you agree to do, although in one sense of the word the prompt payment of my indebtedness is a consideration to you, your promise to loan me your yacht cannot be enforced on the ground that there was no consideration recognized by law to support it. Inasmuch as I was already legally liable to pay you the amount of my debt in full, you could receive no valid consideration upon my promise to pay the same if you would loan me your yacht.

Upon the same principle, the promise to perform a duty imposed by law constitutes no consideration to support a contract. If you are subpoenaed to appear in Court as a witness in a case in which I am interested, a promise made by me to pay a certain

sum of money to you if you will attend will be utterly void, because in attending you are but obeying the command of the subpoena and suffer no detriment in doing what you are legally bound to do. Similarly a contract not to do that which a man is by law forbidden to do, such as forging the signature of another, or committing an assault, is void.

Another important question arises in connection with the subject of consideration. It frequently happens that a man will promise to pay a part of his debt in consideration of a release of the whole. Will such a promise, if accepted, be binding? It will not for the reason that a promise to pay a part of a debt, for the whole of which you are liable, constitutes no consideration. The difficulty is avoided by a promise to pay something different than money or a small sum of money and certain other property of value. If A owes B \$1,000 and promises to pay him \$500, and also gives him a horse worth say \$150 in settlement of the full amount of the bill, this promise would be good. The distinction consists in the fact that the value of the horse, watch fob or other chattel given, either in full payment, or in addition to the payment of a less sum of money than the amount due, is not readily determinable, and may, perchance, be of more value to the creditor than its actual market value. By this means the rule that a promise to pay a less amount than is due is no consideration for the cancellation of the balance is circumvented.

Another important exception to the rule that a part payment is no consideration for the release of the entire debt exists in the case of an assignment for the benefit of creditors, where a number of creditors agree to accept a certain percentage of their entire debt in satisfaction of their claims. Upon what principle, it might be asked, can a number of creditors do that which an individual creditor cannot do? Apparently no better consideration exists for the release of the whole upon payment of part of an indebtedness, if owing to several, than if owing to an individual creditor. Nevertheless, the law holds that there is a sufficient consideration contained in the mutual promises of the several creditors between themselves, whereby they obtain that which they otherwise would not receive.

Suppose, however, that a dispute arises between two parties as to the amount of the debt. For example, A claims that B owes him \$300, whereas B admits an indebtedness of only \$200. The matter is finally compromised by B agreeing to pay A \$250 in full satisfaction of the debt, which is accepted by A. Subsequently it is discovered that the exact amount of the debt was \$300. The

original agreement to compromise the dispute by the payment of \$250 would in this case be binding, on the ground that the law favors the amicable adjustment of controversies and recognizes a valid consideration for the release of the balance of a debt where the same is disputed. The consideration consists in the expense and vexation saved by compromising the dispute which would be imposed upon the parties in case litigation was necessary.

Consideration, as we have learned, may be executed or executory; if the benefit accruing to one of the contracting parties consists of value which was given before the promise was made, there is no consideration; in other words, a past consideration subject to the exceptions hereinafter noted will not support a contract. To illustrate: If I should perform certain services, resulting in some benefit to you, assuming that it was suddenly necessary for me to do so to save or benefit your property or other interests, and you should subsequently promise to pay me a certain sum to compensate me for my labors, I would not be able to recover upon this promise because it was made after the consideration therefor, the performance of the service, was given. A better illustration is perhaps furnished in the case of a warrantee given after a contract is closed. A purchases a gold watch from B and after paying for and receiving the same, A returns and asks B if it is warranted for a year, to which B replies in the affirmative. In the event of a defect in the watch within a year, A would not be entitled to recover upon the warrantee because it was made after the contract was closed. The consideration for the warrantee was past, which, as we have observed, will not support a contract, and it is therefore void.

It should be borne in mind, however, that a consideration, though past, conferred at the request of another, will support a subsequent promise. Suppose that A requests B to perform certain services for him, and after B has performed such services A promises to pay him one hundred dollars. Although the consideration in this illustration was past at the time the promise was made, the contract would nevertheless be binding. This exception to the general rule is made for the reason that it is manifestly unfair to excuse a man from a promise made in consideration of a past benefit conferred at his own particular request.

A promise is often made to pay a debt which has been rendered unenforceable by virtue of the statute of limitations. It is important to understand clearly the effect of such a promise.

Consider, for example, that seven years after a debt has fallen due, I come to you requesting its payment. The Statute of Limitations in most States debars recovery of a debt after the expiration of six years from its date. However, recognizing a moral obligation to pay the debt, you promise to do so. This promise could be enforced in a suit at law, because the promise merely revives an old debt and consequently no new consideration is necessary, the old consideration reviving with the old debt. The object of the Statute of Limitations is to prevent the prosecution of stale claims, but if a promise is made to pay a debt outlawed by the Statute, it will be collectible for six years from the date of the promise.

Considerable doubt has been expressed as to whether or not a moral consideration will support a contract, but the weight of authority is to the effect that it will not. Thus a guardian who expends his own money to improve the property of his ward is clearly entitled upon every moral consideration to be repaid by the ward who has profited through his guardian's kindness. Nevertheless a promise by the ward upon reaching his majority to repay the guardian, being based wholly upon a moral consideration, will not be binding. There are cases in Pennsylvania holding that the existence of a moral duty will support an express promise to perform the duty.

Contracts in Writing.

In the above discussion we have found out that every simple contract must be supported by a consideration. There is a certain class of contracts which, in addition to the requirement of having a proper consideration, must be expressed in writing. The contracts required to be reduced to writing before any right of action can arise therefrom are regulated by the Statutes of Frauds and Perjuries. These statutes merely require that the contract expressed in writing shall set forth its terms with reasonable definiteness, the principle object, as indicated by the title of these statutes, being to prevent frauds and perjuries.

The contracts necessary to be expressed in writing by the law of Pennsylvania are contracts for the sale of real estate, contracts for the leasing of real estate for any term exceeding three years, contracts creating a trust in lands, tenements and hereditaments, contracts of executors and administrators to answer for damages out of their own estate, and contracts to answer for the debt or default of another. Unless such contracts or mem-

oranda thereof are reduced to writing and signed by the party to be charged therewith, or by a duly authorized agent, they cannot be enforced. Such contracts are not *per se* void, but are merely unenforceable in a court of law unless fulfilling the requirements of the statutes.

The Statutes of Frauds and Perjuries differ somewhat in the different States and interesting questions arise where contracts are made in one State and sought to be enforced in another, in which States the Statutes differ. It is a general rule of law that the law of the place or jurisdiction within which a contract is made governs its validity. But suppose a contract is made in a State the law of which does not require the same to be reduced to writing. The parties subsequently remove to Pennsylvania, where a breach of the contract takes place. Can there be a recovery in this State where the law requires written evidence of the contract? The contract is valid according to the law of the State wherein it was made, but as the Statutes of Frauds and Perjuries do not operate to render any contract void, but merely regulate the manner in which contracts of a certain nature must be proven, recovery could not be had in Pennsylvania, in the absence of the requisite written evidence of the contract required to prove it according to the law of this State.

Reality of Consent.

We have now considered three elements which must necessarily enter into the formation of every valid contract, proper capacity of the parties, the existence of a definite offer and acceptance, and the presence of either form or consideration. The next essential element to engage our attention is that of Reality of Consent. The agreement entered into may apparently include all the necessary requisites of a valid contract, nevertheless if the agreement is obtained by fraud or deceit, or if there is a mutual mistake of a material fact regarding the subject matter of the contract, as, for instance, if the subject matter of the contract was, unknown to either party, not in existence at the time the agreement was made, it is clear that no valid contract can under such circumstances exist.

The parties may have made a mistake regarding a material fact connected with their transaction, as above noted. Now, such a mistake must be distinguished from a mere error in judgment, as a mistake concerning the profits to be derived from the contract. Such a mistake, being altogether one of judgment, will

not release the party from his obligations. A mistake to nullify a contract must be a mistake in a material fact. If I agree to purchase from you a certain lot of goods, which it subsequently develops had at the time of our agreement been destroyed by fire, of which fact we were both ignorant, no contract would be made, because the subject matter thereof was not in existence at the time we entered into the agreement. This illustrates such a mistake of fact as would invalidate a contract.

Again, the mistake of fact may be made regarding the identity rather than the existence of the subject matter of the contract. To cite an old illustration, John Doe sold Richard Roe a cargo of cotton to arrive on the ship *Peerless*, from Bombay. As a matter of fact there were two ships bearing the same name sailing from the same port. In making the agreement, John Doe had in mind one of these ships, while Richard Roe thought of the other. Under these circumstances no contract was made because there was an honest mistake of fact regarding the identity of the subject matter.

Not only will a mistake as to the identity of the subject matter invalidate a contract, but a mistake with reference to the identity of the contracting parties will also render the contract void. Suppose A agrees to furnish B with a certain amount of tea and coffee for a year. Before the expiration of the year, A sells out his business to C, who continues to furnish B with the above articles. B upon finding out that C is furnishing him with tea and coffee instead of A can repudiate any liability to carry out the contract, because, not having entered into any contract with C, and having entertained the idea that it was A who was furnishing him with the goods, he would not be compelled to pay C for such tea and coffee as might have been delivered to him.

It sometimes happens that a man mistakes the character of a contract entered into by him. If a paper is signed with the understanding that it is a release, when in reality it is a promissory note, the party signing such a document would not be bound thereby because a mistake existed as to its character. If, however, a question arose as to which of the two innocent parties should suffer the loss due to such a mistake, the burden would fall on the party executing the instrument on account of his negligence in not reading the paper carefully and informing himself of its contents.

Mistake of a material fact, as we have seen, renders a contract void. There are, however, certain other forms of unreality of consent which, although not invalidating a contract,

nevertheless furnish one of the parties an opportunity to avoid the consequences of the contract. Such unreality of consent may result either from a misrepresentation or a fraud. As it is very important to have a clear conception of the distinction between misrepresentation and fraud, let us consider carefully what constitutes each, and what effect the presence of each has upon a contract.

In its legal signification, misrepresentation does not necessarily imply wilful falsehood, but must be understood to be the result of a mis-statement of fact innocently made by one of the contracting parties to the other. For example, if I sell you a watch which I honestly believe to be eighteen karat gold, but which, as a matter of fact, is a very inferior article, I am guilty of a mis-statement of fact innocently made. Such a misrepresentation would give the right to the injured party to rescind the contract.

It is sometimes difficult to determine whether or not the misrepresentation forms an integral part of the contract or is merely collateral to it. In the former instance the validity would and in the latter instance it would not be affected. If a dealer in diamonds sells a customer a diamond which he honestly believes to be a stone of the first water, but which in reality is only glass, the misrepresentation obviously forms part of the contract, i. e., is an integral part thereof. But if a valuable horse is sold with the representation that the left hind foot is white, whereas it is the right foot that is white, this misrepresentation would not form part of the contract and hence would not affect its validity.

Representations forming part of the contract must, moreover, be distinguished from warranties which are agreements collateral to the contract. If an article is sold represented to be of a certain quality with the proviso that if it is not of the quality represented the contract may be rescinded, the representation as to quality is an essential element of the contract and not a warranty. If, on the other hand, an article is sold warranted to be of a certain quality, but no provision is made providing that in case it is not the contract may be rescinded, the sale cannot be repudiated even though the article be very much inferior in quality. An action would, of course, lie to recover damages for the breach of the warranty and the measure of damages would be the difference between the actual value of the article and the value of the article as it was represented to be. Misrepresentation in the contract gives a right to rescind; but the breach of a warranty gives only the right to sue for damages. As warranties

are very commonly made in sales of merchandise, the above important distinction should be very carefully observed.

It is frequently provided in a contract that its conditions must be performed within a limited time. When such a condition forms part of the contract, i. e., when time is of the essence of the contract, its breach confers upon the injured party the right to rescind it; when a time stipulation is collateral to the contract, a failure to perform the contract within the time limited merely gives rise to an action for damages, covering the loss incident to the delay, but the contract is nevertheless enforceable.

Time is not of the essence of a contract, unless made so by the express stipulation of the parties or unless it is to be implied from the nature of the subject matter that the parties so contemplated it; no such implication will ordinarily be made as to contracts for the payment of money, or the conveyance of land, or in any case where the damage caused by a breach with regard to the time of delivery can be compensated for in money.

A very usual form of misrepresentation arises as a result of a man's over-anxiety to dispose of his goods. It is very natural for one to employ commendatory phrases and to exaggerate the value of his wares, but a mere extravagant description is not necessarily a misrepresentation such as would affect the contract. A in selling a hotel to B stated that it was leased at the time by a good tenant. As a matter of fact, the tenant was a very poor one, not having paid his rent for a considerable time past. The Court declared that a "good tenant" meant one who paid his rent promptly and regularly, and hence the representation that the tenant in possession of the hotel was a good tenant being false, the contract was annulled. Ordinarily a man is presumed to deal with another at arm's length and should not rely explicitly upon representations. The doctrine of *caveat emptor*, "let the purchaser beware," implies a duty on the purchaser of goods or merchandise of any kind to exercise his own judgment and means of information. A purchaser deceived in the value or quality of goods he had the opportunity of inspecting cannot recover in the absence of false statements wilfully made by the vendor of said goods. An expression of opinion, however erroneous, must be distinguished from a positive statement of fact, and will not give rise to a cause of action.

We have seen that a contract may be set aside if a misrepresentation is made of a material fact. There are a certain class of contracts which is governed by a failure to disclose a material fact. In this connection contracts of life and fire insurance are

illustrations. It is well known that a failure on the part of the insured to state fully all facts which, if known, would affect the risk taken will defeat the right of the insured to recover.

A misrepresentation, if forming part of the contract, gives the right to the injured party to rescind; if the misrepresentation is collateral to the contract, we have seen that only an action for damages will lie on behalf of the injured party.

Suppose the misrepresentation of a material fact instead of being innocently made was made with the express purpose of deceiving? It would then constitute what is known as fraud. There are five elements necessary to render a statement fraudulent in the eyes of the law. It must be (1) a false statement (2) of a material fact (3) made with a knowledge of its falsity or with a reckless disregard of its truth; (4) it must be acted upon by the party to whom it is made (5) who must suffer loss thereby.

The representation to constitute fraud must in point of fact be false, and it must be a statement of fact as distinguished from an expression of opinion or judgment. The false statement of a material fact must, to be fraudulent, have been made with the intention of deceiving. The deception practiced may not have been intended to injure the party who suffers thereby, but, nevertheless, if the false statement was intended to deceive, liability rests upon the party making it to whosoever is affected thereby. I sell to you a rifle which I represent as thoroughly safe and made by a reputable house. Both of these statements I know to be false. You purchase the rifle and give it to your son, who is injured in using it. I claim in a suit brought to recover damages that, inasmuch as I did not make the false statements to your son, but to you, I am not liable for your son's injuries. This argument would not prevail, the law holding that I am liable not only to you, but also to your son or whosoever was injured as a result of my deception or fraud.

The most difficult question to determine is not whether the statement of a material fact was false, but whether or not it was known to be false by the party making it. The knowledge of falsity is the essence of fraud. Sometimes, however, a statement is made by a party who perhaps does not know it to be false, but who, notwithstanding, makes the statement with a reckless disregard of its truth. Now, it is quite plain that a man has no right wilfully to assert as a fact that of which he is in entire ignorance. Such reckless assertions should render the party

making them responsible in both morals and law to whosoever is prejudiced thereby.

The rules above stated in regard to the truthfulness of representations should be particularly observed in the publication of prospectuses of proposed companies or corporations. The utmost candor and honesty should characterize every statement contained in a prospectus. A failure on the part of a promoter of a corporation to state everything with accuracy and care will vitiate a contract with one whom their misrepresentations have induced to invest in the enterprise.

No fraud exists unless the false representation was acted upon by the other party. The reliance upon the fraud must also result in some injury or prejudice to the party relying thereon.

Having determined what constitutes fraud, let us next inquire into the effect of fraud upon a contract.

The existence of fraud in a contract does not necessarily render the same void. Fraud will render an executory contract voidable at the option of the injured party. He may carry out the contract and sue for the loss sustained as a result of the fraud, or he may repudiate the entire contract and sue for damages covering his losses. It is necessary for the injured party promptly to notify the other party of his determination after discovery of the fraud, otherwise the contract will be deemed to have been ratified. If he decide to rescind the contract he may sue to recover that with which he parted under the contract. Proof of fraud will also constitute a good defense to either an action at law or in equity for specific performance. The injured party may also recover what is known as punitive damages, which are awarded not only to compensate him for his losses, but to punish the party guilty of the fraud.

Duress and Undue Influence.

The last two forms of unreality of consent which we will consider are duress and undue influence.

In order to compel the execution of a contract, violence, either actual or threatened, is sometimes offered to a man or a member of his immediate family. This is what is known as duress, and in such a case the consent given is unreal, the will being overpowered by fear of injury. A contract so entered into may be avoided at the option of the injured party. Duress is of three kinds: (1) Duress of imprisonment; (2) duress *per minas*, where personal injuries or imprisonment is threatened in

order to force a party to enter into a contract; and (3) duress of goods, being a case where one has in his possession or control goods of another and threatens to exercise his control over said goods to the prejudice of the other party, which threat is made for the purpose of compelling the other party to enter into a contract. Any agreement made under such a threat can be avoided.

Similarly when undue influence is exercised upon a man to induce him to execute or enter into a contract, he may be forced to do that which his better judgment disapproves. Undue influence is usually exercised upon old or feeble-minded people, upon orphans, minors and certain other classes of people who occupy a confidential relation with the party exercising the undue influence. There is also a presumption of undue influence when one takes advantage of another's necessities and distress, as, for example, usurious interest charged for loans. Undue influence occurs more frequently in the case of wills than in contracts. The presence of undue influence in a contract will invalidate it.

The party seeking to set aside a contract on the ground of undue influence has the burden of proving the same. In certain cases, however, the burden of rebutting the presumption of undue influence rests upon the party benefiting by the contract, in view of the relationship existing between the parties. If a son sold his father a very valuable piece of ground for an inadequate consideration, the burden would be on the father to prove that he did not exercise undue influence upon his son. All parties standing in *locus parentis* or in a fiduciary capacity must prove that no undue influence was exerted to obtain any advantage from those to whom they stand in such relationship.

Legality of Object.

We have now brought two parties with legal capacity to enter into a contract together; an expression of their intention has been made in the proper manner by a definite offer and acceptance; said offer and acceptance may involve a valid consideration or may be set forth in writing under seal; furthermore the consent of the parties may be real, i. e., free from mistake, misrepresentation, fraud, duress or undue influence; nevertheless the contract, although involving all of the above essential elements, will be void if the objects sought by the contract to be accomplished are illegal. Such illegality will arise if the object contemplated by the contract is forbidden by statute, if it is

contrary to the common law, or if it is opposed to general public policy.

An act of Congress or of a State Legislature may provide that a certain class of contracts are void, or perhaps such statute may merely provide that a penalty be imposed upon all persons who enter into a contract of a certain character. In the latter instance the contract is not void, but if the statute specially declares that the objects of certain contracts were illegal, the contract would be absolutely void and no rights would be acquired thereunder.

A very common class of contracts declared by statute to be void are wagering contracts. By Act of Assembly money lost on a horse race or other game of hazard or upon an election result cannot be recovered. The statutes of Pennsylvania also prohibit the performance of worldly business on Sunday. Any contract made on the Sabbath Day, if it remains executory, is void. The exceptions to this rule are contracts of necessity and contracts of charity.

The law of this State also makes it unlawful for a man to act as a real estate or merchandise broker without having first obtained a license. The cashier of a State bank is prohibited by law from engaging in any other business.

If a contract having a specified object is forbidden by law, any contract collateral thereto is likewise invalid. If a promissory note is given in settlement of a bet, this note is itself invalid because wagering contracts are forbidden and the consideration thereof is illegal.

If the object of a contract is contrary to any rule of common law it is invalid. Thus contracts to commit a civil wrong or a crime are absolutely void.

Any contract whose object contravenes any rule of public policy is also void. Any act the performance of which is deemed to be detrimental to the general public welfare is opposed to general public policy and, therefore, void. To illustrate, any contract whose object it is to defeat justice, to promote litigation, to restrain marriage or trade are void because opposed to public policy.

The policy of the law has always been to encourage marriage, and consequently any contract in restraint thereof will not be recognized.

It is also the policy of the law to promote trade, and consequently any agreement which unreasonably restrains a person from exercising his trade or business is void. A common example

of such an agreement is where a business man disposes of his business to a competitor, and in consideration of the price paid for doing so agrees not to engage in the same business again. Obviously this agreement is in restraint of trade and, therefore, void. The Courts will, however, sustain a contract not to engage in a particular trade or business within a specified territory for a limited period of time, partial restraints being unobjectionable. Total restraint of trade, or what practically amounts to the same thing, cannot be enforced in a Court of law.

It should also be noted in this regard that the law forbids the formation of monopolies and trusts whose purpose it is to control or enhance the price of necessary commodities by preventing competition in the sale thereof, or by withholding them from the market. Such an object is opposed to public policy, in that it is in restraint of trade, and any contract or agreement embodying such an object is invalid.

It sometimes happens that the illegal character of the contract is not apparent, one of the parties being entirely ignorant thereof. For example, I may enter into an agreement with you to lease a house which I intend to convert into a speak-easy. If you are innocent of my intention you could hold me to my contract, providing there was nothing to indicate the illegality of the contract on its face. If, however, you were aware of my illegal object the contract would be void, being tainted by an illegal object.

The effect of illegality upon contracts varies according to circumstances. The general rule is that where part only of a contract is illegal, the part which is legal can be enforced if it can be separated from the illegal part. If, however, the contract is indivisible it is void *in toto*.

Operation of Contract.

Having pointed out the manner in which a valid contract may be created, the next inquiry to engage our attention is upon whom does such a contract confer rights and liabilities, and can such rights and liabilities be assigned or pass to others than the original parties to the contract?

The party to a contract who gives the consideration should enjoy the benefit, and the party who makes a promise should be obliged to keep it. It may be stated as a general rule that a contract cannot impose an obligation or confer a right upon any person not a party to the same. Thus if A should contract with

B to pay C a certain sum of money, this contract would not confer any rights upon C. There are, however, certain well-recognized exceptions to the rule above stated. If a contract between two parties establishes a trust for the benefit of a third party, said third party can bring suit against the promisor and have the contract carried out.

Suppose A and B are partners in business. B retires from the firm and turns the assets over to A, who promises to assume all liabilities of the firm. Upon this promise made by A to B, X, a creditor of the firm, could sue in his own name and recover a debt owing by the firm to him. The decisions are not, however, entirely uniform in this regard.

When a contract has been made between two or more parties, there is a duty imposed upon outside parties not to interfere with the contractual relation so established. This rule applies more particularly to contracts of employment, a man being liable in damages who maliciously induces the employee of another to break his contract of employment.

Under certain circumstances, however, third parties may take the place of the original parties to the contract, such substitution being effected by an assignment. An assignment of a contract may be accomplished in two ways (1) by act of the parties and (2) by operation of law.

A man cannot assign his liabilities to a contract, his power of assignment being limited to his rights thereunder.

Contractual rights may be assigned under three conditions, (1) the assignee must give a consideration; (2) the person liable for the debt or the performance of any act under a contract must be notified of the assignment; and (3) the assignee in acquiring rights under the contract takes subject to such defenses as may exist against the assignor.

The assignment may be either verbal or written, the form being immaterial, except in cases coming under the provisions of the Statutes of Frauds. Notice of the assignment may be given in any manner, it merely being required that knowledge of the assignment be brought to the attention of the party liable under the contract.

Where an assignment takes place by operation of law, both rights and liabilities arising out of a contract may be transferred. To illustrate this principle, consider a contract between A and B whereby A is to construct a building for B. When the work is half completed B dies. Will A be compelled to carry out his contract by completing the building? The rights of B pass by

operation of law either to his executors or administrators, and A could be compelled by B's representatives to perform his contract. Rights under a contract are personal property and pass by operation of law to a man's personal representatives. Likewise the liabilities on contracts into which a decedent may have entered are imposed upon his executors or administrators by operation of law.

In the case of bankruptcy, all rights under any contracts in which the bankrupt was a party, pass by law to the trustee in bankruptcy, the bankrupt having surrendered his property into Court to be distributed among his creditors, and by so doing is subsequently discharged from all liabilities therefor.

There are, moreover, certain contracts for the sale of real estate, which contracts by operation of law become binding upon parties not involved in the original contracts. Such is the case with contracts containing covenants which are said to "run with the land." This class of contracts will be considered more in detail in the lectures on real estate.

It should be carefully noted that all contracts calling for a personal relation between the parties cannot be assigned. This applies more particularly to contracts for personal services, in which confidence, trust or a high degree of skill is required. A man has a right to the benefit he contemplates from the character, credit and substance of the person with whom he contracts, and hence such contracts cannot be assigned.

Any contract, the breach of which invokes only personal injuries, not affecting the value of property, is unassignable, either by the act of the parties or operation of law, as for example a contract of marriage.

The assignability of negotiable instruments forms an exception to the above-enumerated rules, and will be considered later in the course.

Interpretation.

Having ascertained the manner in which a contract may be created and the parties that may be affected thereby, we will now consider the rules governing the interpretation of contracts. The object of the law in construing a contract is to determine the intention of the parties. Let us assume that the terms of the contract have been clearly proven, but that a dispute has arisen regarding the meaning of the terms used. Upon what basis will the law proceed to interpret the contract?

In the first place, the object aimed at in interpreting a con-

tract is to arrive at the intention of the parties by a consideration of the whole agreement. Every part of a contract should harmonize with every other part, but where one clause is repugnant to another the prior clause will be accepted and the latter clause rejected. Similarly where part of a contract is in writing and part printed, the terms of which are inconsistent, the written part will prevail in preference to the printed part.

The words contained in an agreement will always be given their plain and literal meaning. A man will not be heard to deny that he meant what his words clearly imply. If words used by a party in a contract have a legal significance of which he is ignorant this is a misfortune, but affords no excuse for construing words in any other sense than what is plain, literal and obvious. The meaning of words must be that which is understood by the mass of mankind. If technical words are employed they will be given the meaning ascribed to them in the trade, art, business or profession to which they appertain. A contract made in a locality wherein a particular usage or custom prevails will be governed thereby.

In analyzing the intention of the parties to a contract, all the circumstances leading up to its formation will also be considered. Thus the subject matter of the contract, the consideration therefor, the object sought to be affected thereby and all the surrounding circumstances will be inquired into in order to find out what the intention of the parties really was.

Words are always construed most strongly against the party using them; that is when opportunity is given for latitude of construction, words will be construed most strictly against the party employing them. For example, in an insurance policy, words are construed most strongly against the insurance company; in a deed against the grantor, etc.

In view of the fallibility of human nature, it is always the part of prudence to reduce contracts of any importance to writing and be sure to embody every essential detail into the written contract. Trust nothing to memory. These recommendations should be carefully observed in view of the fact that it is a well-established rule of evidence that no oral evidence will be received to vary or contradict the terms of a written contract. When a person has taken the precaution to reduce a contract to writing, it is presumed he has carefully considered the entire agreement, and consequently he will not be allowed to abrogate the effect of a written contract by setting forth an oral agreement inconsistent with the terms of the written agreement.

The above stated rule, although a most salutary one in many regards, would, under certain circumstances, operate harshly. Hence certain exceptions have been made which it will now be our purpose to briefly outline.

Assume that a contract has been made, properly reduced to writing and executed, but which was obtained through duress, or was the result of fraud or misrepresentation. It would surely be a hardship to prevent oral evidence to establish the invalidity of such a contract. Hence oral evidence may always be produced to prove the illegality of a written agreement.

Although the terms of a written contract cannot be contradicted by oral evidence, it is permissible to offer oral testimony to determine the meaning of peculiar or technical terms contained in the contract. This is frequently necessary in admiralty cases to construe nautical words and phrases, which may be done through the introduction of oral evidence.

After executing a written contract the parties may subsequently desire to alter or modify the same. If the original contract was obliged to be under seal or written by virtue of the Statutes of Frauds and Perjuries, the alteration must also be under seal or written. But if a contract has been reduced to writing in the absence of any legal necessity, oral evidence will be received to prove any subsequent oral agreement altering or modifying the terms of the original written agreement. It would, as a matter of protection, be well to always include in a written contract the manner in which it may be subsequently changed, if so desired.

In connection with the rules applicable to the interpretation of contracts, the importance of the distinction between a penalty and liquidated damages cannot be overestimated. The observance of this distinction further indicates the object of the Court to definitely ascertain the intention of the parties.

It is usual, especially in building contracts, to provide for the payment of a fixed sum of money by the party guilty of a breach of the contract. The question that presents itself is whether such a sum was intended as a penalty or liquidated damages. Suppose A agrees to construct a power house for the B company, the work to be completed by July 1, 1911. The contract provides that A shall pay to the B company the sum of two hundred and fifty dollars per day for every day the operation remains uncompleted after July 1, 1911. Now, the important fact to determine is whether the two hundred and fifty dollars is to be regarded as a penalty for A's failure to finish the work

within the stipulated time, or whether said sum of two hundred and fifty dollars is to represent the damages sustained by B on account of the delay. If the amount is construed to be a penalty, the Court would not permit B to recover the same, B only being able to recover his actual loss. If however, the two hundred and fifty dollars is to be regarded as liquidated damages, B could recover the entire amount regardless of the extent of his actual losses. It is immaterial whether the parties refer to the amount to be paid in case of default in performance of the contract as a penalty or liquidated damages, the Court will consider the entire agreement and determine whether such sum is to be treated as a penalty or liquidated damages. The parties by saying so cannot convert what in reality is a penalty into liquidated damages.

To arrive at the proper conclusion, the following rule has been adopted: If the amount of money stipulated to be paid upon a breach of the contract is to compensate for a loss which is uncertain in amount and impossible of definite ascertainment at the time the contract is made, the sum to be paid in default of performance of the contract is to be regarded as liquidated damages. If the amount stipulated to be paid is understood to be compensation for a loss that can be definitely ascertained in advance, and the amount recoverable exceeds the actual loss, then such sum is to be regarded as a penalty. Care should be exercised in the wording of a contract to make certain the amount recoverable in the event of a breach is liquidated damages, it being remembered that the law is opposed to the enforcement of a penalty.

Discharge of Contract.

Having indicated how a contract may be formed, the parties whom it affects, and the rules regulating the interpretation thereof, the last question to be considered is: How may the contractual relation be discharged?

Inasmuch as two or more individuals may by agreement assume certain obligations, they may also by agreement release themselves from such obligations.

An agreement discharging a contract may be in the nature of a waiver; it may be by the substitution of a new contract for the old one; or there may be an express provision in the contract itself providing for its discharge.

A waiver is an express agreement that the contract shall not be longer obligatory upon either party. As in the case of any other agreement, a waiver requires a consideration. Where a

contract remains executory, that is, where neither party has performed his part, it may be waived by mutual consent. In such a case the abandonment by each party of his right to a performance by the other is a sufficient consideration for the contract of waiver. An executed contract cannot be discharged in the absence of consideration except by a release under seal.

A sealed contract or a written contract may be discharged by an oral contract, providing there is a consideration therefor. Although it is not necessary for a contract to be discharged in the same form as that in which it was made, yet prudence would dictate that such a practice be adopted.

Discharge by Substituted Contract.

A new contract may be substituted for an old contract either wholly or partly different therefrom. The substituted contract may result either from an express agreement abrogating the old contract in whole or in part, or it may result by implication, where the terms of the new agreement are inconsistent with the old contract.

A contract may, furthermore, be discharged by the substitution of a new party for one of the parties to the original agreement. This substitution of a new party is what is known as a novation. If A and B are the contracting parties, and agree that C shall take the place of B, this operates as a novation, and B is released or discharged from all further liability on account of his original contract with A, C assuming the same. This principle is frequently illustrated in the case of a retiring partner from a firm. If a creditor is notified of the retirement of a partner from a company, and either expressly agrees to release him or continues dealing with the firm upon the old basis, the retiring partner is discharged from liability, the creditor looking to the continuing partners for the performance of all contracts and the meeting of any indebtedness.

It sometimes happens that a contract is discharged by the happening of certain conditions. For example, if a contract of service provides that either party may terminate it by one month's notice to the other, an exercise of this option by either party will, of course, discharge the contract.

When both parties have done all they are required to do under the contract the contract is discharged by performance. A performance must be in accordance with the terms and conditions of the contract, but the law will not hold a man to the strictest

performance, but is satisfied by a substantial performance. A performance is substantial which conforms with the ascertained intention of the parties to the contract. Thus a provision that a builder shall use "the best French plate double-thick glass, similar to that used in a certain other building," only requires the builder to use a fair sample of the quality of glass specified, and not that each plate should be the best specimen of its kind.

One of the parties to the contract may be perfectly willing to carry out his agreement, and may make a tender of performance to the other party which is not accepted. If I tender you \$500 which I owe you under a contract, and you refuse to accept the same, I am not excused from paying you the amount I owe, but upon proof that I have made you a tender I am relieved from the obligation of paying the costs of a suit, interest on the debt or damages for non-performance. To be valid a tender must be of the entire amount due and must be unconditional.

If instead of a party making payment of money, suppose a promissory note is given for the amount due; the discharge is only conditional upon the note being paid at maturity. If the note goes to protest, the original contract revives and can be sued upon and the note disregarded.

Discharge by Breach.

If one of the parties to a contract fails to perform that which he is bound to perform thereunder, such default constitutes a breach of the contract on his part. Such a breach does not necessarily discharge a contract, although under certain circumstances hereafter to be considered it may. It will, however, always give to the other party a right to recover damages for such injuries as he may have sustained by virtue of the breach.

In the event of a breach, the question arises whether or not it affects an integral part or term of the contract or whether it merely relates to a collateral agreement or warrantee. The distinction between a representation which is an integral part of the contract and one that is collateral thereto has been emphasized heretofore. In the former case, failure to perform the agreement will discharge the contract so as to absolve the other party from all liability on his part. In the latter case, such a failure may give rise to an action for damages, but will not discharge the contract. Similarly the breach of an integral part of a contract, affecting the substance thereof, will discharge the same; a breach of a collateral part of the contract will only give rise to an action for damages.

A breach of a contract may affect either the whole or only a part of it. In contracts comprising a number of separate agreements it is necessary to ascertain whether a breach of one of the agreements will destroy the entire contract or only that part which it directly affects.

Suppose A and B enter into a contract whereby A agrees to furnish B 600 tons of coal, 200 tons to be delivered in the months of April, May and June, respectively. The April shipment is short some 120 tons. B immediately considers the default as a breach of the contract. It cannot be denied that A was guilty of a breach of the contract, but the contract was clearly a divisible one, and if A fulfilled his contract by making delivery of the required number of tons in May and June, B could only recover damages resultant upon the default in the April shipment. The question to be determined in such cases is "What is the substance of the contract?" The mere fact that deliveries are to be made at different times is not of itself sufficient to conclude that failure of delivery in one instance discharges the contract. It simply gives a remedy in the nature of an action for damages. We must endeavor to find out the real intention of the parties, and if the parties intended that a series of separate agreements should constitute a single contract, then a breach of one will destroy the whole, otherwise the rule will be as in the illustration given above. In connection with divisible contracts the decisions are very close and the circumstances of each case must be carefully considered.

A breach of a contract may occur by an express renunciation by one of the parties thereto. If I agree to furnish you with a certain number of railway chairs and after delivering part you decline to accept any more, by renouncing your part of the contract you are guilty of a breach. It is not necessary for me to complete the manufacture of the balance of the order and tender delivery to you, but I may immediately sue you for damages on account of your renunciation. The contract is regarded as at an end, and my right of action exists whether the renunciation was made before or after the time when the contract was to have been performed.

The promisee has an inchoate right to a performance of the contract which becomes complete when the time for performance arrives, and in the meantime has a right to have the contract kept open as a subsisting and effective agreement, and the promisee can in all cases treat a renunciation before the time of performance arrives as a breach of the contract. Two principles

must be borne in mind in applying this rule: The repudiation of the contract must be absolute and the other party thereto must elect to consider it as a discharge of the entire obligation. A contracts to furnish B with certain steel rails on November 1st, a further amount on December 15th and the balance on January 1st. He ships the amount due on November 1st, but on December 10th writes B that he will not be able to make delivery of the amount that was due on December 15th. On December 25th B writes to A that he is willing to accept the amount that was due on December 15th. In a suit brought by A against B to recover the price of the rails which were shipped on November 1st, B endeavored to set off damages for breach on A's part in not making the delivery on December 15th. The Court refused to allow this set-off on the ground that B acquiesced in the renunciation, as was evidenced by his communication to A under date of December 25th.

Breach Arising from Impossibility of Performance.

A contract may be discharged not only by a formal refusal by one of the parties to carry out his part, but also if one of the parties renders the performance of the contract impossible by his own act. This will operate as a complete breach if done either before or after the time for performance arrives. To illustrate this principle, suppose A, an insurance agent, contracts to represent the B Insurance Company for the period of three years. The company, however, voluntarily winds up its business at the end of one year. A would be entitled to bring suit at the end of one year and recover his salary for the full period of three years.

In the earlier discussion of this subject, it was pointed out that if there were any conditions which rendered performance of the contract impossible, existing at the time the contract was made, as in the event of the subject matter being destroyed by fire, which fact was unknown to the parties, the contract would be void, or rather there never would have been a valid contract. We will now consider how a contract may be discharged by impossibility of performance arising after the contract is made. If it has become impossible for a man to perform his contract, the Courts cannot, of course, compel specific performance, but the defaulting party will, nevertheless, be liable in damages. To protect himself a man in making a contract, should always introduce such stipulations as will relieve him of liability upon the happening of conditions which would render the contract impos-

sible of performance. Thus if I should contract to deliver to you a cargo of goods by a certain date, but am prevented from doing so on account of a violent storm, or the happening of other conditions beyond my control, I would not be able on such account to avoid responsibility, no matter how manifestly beyond my power were the conditions preventing the performance. Had I specified in the contract "Storms excepted," I would have been relieved from liability. A man should always stipulate in a contract that he will not be liable in case of acts of God, strikes or circumstances beyond his control.

Under certain circumstances, subsequent impossibility of performance will discharge liability under the contract in the absence of express exception. If, for example, subsequent to the date of a contract, the laws of the locality wherein it was made change, making it illegal to perform the same, liability thereunder would be discharged on the ground of impossibility of performance.

Furthermore, in contracts for personal services, death or incapacitating illness operates as a complete discharge.

By Operation of Law.

Contracts may also be discharged by operation of law. When a man becomes a bankrupt, under the Federal statutes relating thereto, upon complying with the requirements of the law, he is thereupon discharged from all liability on account of all former contracts to which he may have been a party. His debts and obligations are discharged by operation of law.

Merger.

If a contract is made under seal, covering in general the terms and conditions of an oral contract previously made, the simple contract is discharged, it being merged into the sealed contract. A contract of less solemnity is always merged into one of greater solemnity, where the same involves the same parties and subject matter.

If one party intentionally alters a material part of a written contract without the knowledge or consent of the other party, the party prejudiced on this account is discharged from all liability under the contract.

Remedies upon a Breach of Contract.

When a breach of contract has occurred in any of the ways heretofore mentioned, the injured party is given certain rights.

In a Court of law he may recover damages to compensate him for such losses as resulted to him on account of the breach. It is obvious, however, that under certain circumstances such damages as might be recovered in a Court of law would be wholly inadequate to the injury suffered. A Court of Equity will, when the remedy at law is incomplete, compel a specific performance of the contract and grant such further redress as complete justice requires. Specific performance is decreed by a Court of Equity most frequently in the case of contracts for the sale of real estate, upon breach of which damages ordinarily would be insufficient. Contracts covering building operations, the construction of railroads, etc., will not be specifically enforced, because to do so would necessitate the exercise of supervisory powers which a Court of Equity will not assume.

We see, therefore, that when a breach of a contract occurs a right of action arises, either for damages or specific performance. How, we next ask, can this right of action be discharged?

The liability which has arisen from the breach of contract may be discharged in three ways: (1) By agreement of the parties; (2) by judgment of a Court of competent jurisdiction, and (3) by lapse of time.

Any party injured by the breach of a contract may release the party guilty of the breach from such rights of action as he may have against him. Such a discharge may be effected by a release or by an accord and satisfaction.

A release from liability for damages is ordinarily made under seal, otherwise it would be a promise without a consideration. If the release is not under seal, a consideration must be present to support it. No particular form is necessary for a release. A covenant not to sue for an indefinite time has been held to be a good release. A release of one of several joint debtors is a release of all, for the reason that where one has been released, the remaining debtor or debtors cannot be jointly liable, and it was only a joint liability that they assumed.

By agreement of the parties, a right of action accruing to one may be discharged by what is known as an accord and satisfaction. To be a valid release the benefit or consideration to be received must be of legal value, to the right of which the creditor was not before entitled and must be executed. An agreement to take property in payment of a debt and the acceptance thereof by the creditor pursuant to such agreement is such accord and satisfaction as constitutes a good defense to an action on the debt. To effect a valid accord and satisfaction there must not only be a

clear agreement or accord, but the agreement must be executed by acceptance of the matter agreed upon in satisfaction.

If a creditor consents to accept merchandise in satisfaction of his claim, and the debtor has the goods ready at the time and place agreed upon, this is a sufficient defense to a subsequent action for the debt. Any new interest or right acquired by the creditor by virtue of an agreement of accord and satisfaction is sufficient to discharge the right of action if received in satisfaction.

Discharge by Judgment.

A second manner in which a right of action arising out of a breach of contract may be discharged is by a judgment. When suit is brought and a judgment recovered, unless reversed by an Appellate Court, the right of action becomes merged in the judgment and is discharged thereby.

Discharge by Lapse of Time.

Lastly, a right of action may be lost by lapse of time.

In every State laws exist, slightly varying, known as the Statutes of Limitation, which limit the time within which suit must be brought. All rights of action arising out of contracts must be sued upon within six years after the right accrues, otherwise the right is lost. If it is impossible to bring suit within the required period of time, by virtue of some disability appertaining to the party in whose favor the right of action exists, such as infancy, temporary insanity, imprisonment, absence beyond the seas and coverture in certain cases, the statute does not commence to run until the removal of such disabilities. In the case of a minor it would not begin to run until he had attained his majority; in the case of an insane person, the statute would run from the time he recovered his reason; in the case of a person absent abroad, it would run from the time the party returned.

Summary as to Contracts.

In summary, a contract is an agreement made between two or more persons, which to be valid and enforceable must comprise a definite offer made by one party and accepted by the other, for which a consideration must be given, or which must be expressed in such a form as to imply consideration, such as an agreement under seal.

Furthermore, the parties must have legal capacity to enter into a contract, and the agreement between them must be free from fraud, accident or mistake, or duress or undue influence.

If the contract contemplates an object which is illegal, in that it is contrary to statute law, the common law or public policy, the same is void.

If a contract embodies the above requirements it operates to bind the parties thereto to the terms and conditions thereof. Rights thereunder may under certain circumstances be assigned to third parties, either by act of the parties or by operation of law. As a general rule, liabilities under a contract cannot be assigned.

A contract is interpreted according to the plain and obvious meaning of its terms; when technical words are employed they are interpreted according to their meaning in the art or science to which they appertain. In interpreting a contract evidence will be received to establish a particular custom or usage existing in the locality within which the contract was made.

A contract when made may be discharged by performance of its conditions by both parties, by waiver of such performance, by breach of its terms, by merger and by operation of law.

When a contract is discharged by breach the injured party may either sue for the damages suffered by virtue thereof, or may compel the defaulting party to specifically perform his contract by the decree of a Court of Equity.

The party liable for the breach of a contract may be relieved from such liability by agreement of the parties, by judgment of a Court of law, or by lapse of time, i. e., the operation of the Statutes of Limitations.

It is hoped that those who have followed the course thus far have clearly grasped the principles involved in the Law of Contracts, as outlined, which will enable the reader to more profitably study the following subjects to be considered, the first of which will be partnership.

**PARTNERSHIP AGREEMENT BETWEEN TWO ACT-
ING AND ONE DORMANT PARTNERS**

Indenture, Made the _____ day of _____, A. D. 19____,
between _____ and _____, heretofore partners under the
style of _____, parties of the first part; and _____ of _____,
party of the second part.

1. **Whereas**, the said parties of the first part have heretofore
carried on the business of _____ as partners under and by
virtue of articles of partnership, dated the _____ day of
19____;

2. **And, whereas**, the said parties of the first part are
desirous of increasing the capital of their said business, for the pur-
pose of more effectually carrying on the same, and have agreed to admit
the said party of the second part into partnership with them, upon
the terms and conditions hereinafter contained, upon his advancing
the sum of _____ dollars, to be added to the said partnership estate and
effects:

3. **Now this indenture witnesseth**, that in pursuance of
the said recited agreement, and in consideration of the sum of
dollars, to be advanced and brought in by the said party of the second
part to the account of the said partnership, at or before the execution
hereof, each of them, the said partners, do, and each of them doth hereby
for himself, his heirs, executors, and administrators, covenant and agree
with the others of them, his executors and administrators, in manner
following: that they will be partners in the said business of
for the term of _____ years, commencing from the
day of _____, subject to the stipulations and agreements hereinafter
contained:

4. That the capital of the said partnership shall be the sum
of _____ dollars, to be brought in by the said partners in the
following proportions, namely: the said parties of the first part shall
bring in the sum of _____ dollars, the original capital of the said
partnership, under the said hereinbefore recited indenture of the
day of _____, and being one-third of the said partnership
capital; and the said party of the second part shall bring in the sum
of _____ dollars so agreed to be advanced by him as aforesaid,
being two-thirds of the said partnership capital, which said last
mentioned sum of _____ dollars shall be paid by the said party of
the second part into the _____ Bank to the credit of the said
partnership, on or before the _____ day of _____ next;
and the said partners shall be considered as creditors with respect
to such capital, and shall be allowed interest thereon at the rate of
_____ per cent. per annum;

5. That the business of the said partnership shall be carried
on at the present store, warehouse, and premises, or at such other place
or places as the said partners shall from time to time agree upon,

under the same style and firm, and in the same manner in all respects (except so far as the same is altered hereby), as the said partnership business has been hitherto carried on by the said parties of the first part;

6. That the said partnership business shall be managed and carried on, and all purchases, sales, bills of parcels, orders, notes, letters, bills, receipts, payments, contracts, securities, dealings, and transactions which shall be made, given, or taken for any matter or thing concerning the same, shall from time to time be so made, given, taken, and entered into in the name of the said parties of the first part;

7. That all goods, wares, and merchandise bought and sold, received in or delivered out, and the prices for which the same were bought and sold, and all moneys, payments, securities, and dealings in general relating to the said partnership business, shall be daily charged and entered by the said parties of the first part in proper books for that purpose, and in particular that a book shall be kept for the entry of the account of cash received and paid on the said partnership account;

8. That the said parties of the first part shall, during the continuance of the said partnership, be the keepers of the cash, bonds, bills, notes, and other securities belonging to the said partnership, and shall balance the said partnership accounts once in every month in such manner as to exhibit the true state and condition of the affairs of the concern; and that the said cash-book, and all books of account, bonds, bills, notes, letters, vouchers, and securities, shall be kept in the counting-house belonging to the said business, or other the place where the said partnership business shall be carried on, and be open at all times during the regular hours of business to the inspection of all the said partners, who shall, without hindrance or denial, be permitted to take copies or extracts therefrom.

9. That if at any time during the continuance of the said partnership any cash, or bills, or other securities shall be received by the said party of the second part on the partnership account, he will immediately pay over the same to the said parties of the first part; and in case of making default in such payment as aforesaid for the space of _____ days, then, and in every such case, a sum equal to _____ dollars per cent. on the sum so detained or withheld shall be charged against the said party of the second part by way of liquidated damages and not by way of penalty, and shall be retained out of his share of the profits of the said business, and added to the capital of the said partnership for the general benefit of the whole concern;

10. That the parties of the first part will, at all times during the continuance of the said partnership, devote the whole of their time and skill, and to the best of their abilities carry on all the affairs of the said partnership, and shall not nor will, at any time during the continuance of such partnership, either directly or indirectly, be concerned in any other trade, business, or profession whatsoever.

11. That the said party of the second part shall not be required

to bestow any attention, or to act in any way in the said business any further than he shall think fit; nor shall he, during the continuance of the said partnership, or at any other time, be prevented from carrying on any other business or trade, excepting that of _____, or any other profession or employment whatsoever, either on his own account or in partnership with any other person or persons;

12. That the profits of the said joint partnership concern, after deducting all such expenses as aforesaid, shall be divided into _____ equal portions, and that the said parties of the first part shall each receive _____ parts of the said profits; the said party of the second part shall receive the remaining _____ parts; and all losses incurred in the course of the said business shall be borne in the same proportions, unless the same shall be caused by the wilful neglect or default of either of the said partners, in which case the loss so incurred shall be made good by the partner through whose default it shall arise;

(Insert any appropriate general clauses, such as requirement to pay private debts, prohibiting becoming surety, etc.)

13. That all moneys advanced by either of the said partners on the joint partnership account, with the approbation of the others of them, and all sums of money which either of them, with such approbation as aforesaid, shall permit to remain in the said business, which, by the rules herein prescribed, he may be at liberty to draw out as part of his ascertained profits thereof, shall be passed to his credit in the partnership account, and be entered in the books of the said partnership, and bear interest at the rate of _____ per cent. per annum for so long a time as the same shall be so permitted to remain therein, and shall be considered as a distinct loan, as if the same had been borrowed from any other person, and be accounted for and paid to him before any division shall be made of the profits of the said partnership;

14. That the said party of the second part shall, from time to time, be allowed to draw out of the said partnership business weekly, and for his private expenses, any sum or sums of money not exceeding the sum of _____ dollars; and that the said parties of the first part shall in like manner be respectively allowed from time to time to draw out of the said partnership business weekly, for their own private expenses, any sum or sums of money not exceeding the sum of _____ dollars each; all such sum and sums of money, from the time of drawing out the same, to be entered in the cash-book belonging to the said partnership, and to be duly accounted for by the said parties respectively on every settlement of account, and division of the profits of the said partnership;

(Insert general clauses for stating annual account, and for general account on dissolution.)

15. That if either of the said partners shall be desirous of determining the said partnership at any time before the expiration of the said term of _____ years, he shall be at liberty so to do, on giving _____ calendar months' previous notice in writing of such

his desire to the others, or either of them, or leaving the same at the counting-house of the said partnership, and such partnership shall determine at the expiration of such calendar months, or at such future day as in such notice shall be named, and the continuing partners shall have the privilege of taking the whole of the partnership business, at the rate at which the same shall be appraised and valued, on paying his or their shares of such valuation to the retiring partner;

16. That in case of the death of either of the said partners before the expiration of the said term of partnership, the surviving partners will settle and adjust all accounts, matters, and things relating to the said partnership, with the executors or administrators of such deceased partner; but the surviving partners shall have the option of taking the whole of the said partnership property at a valuation, the amount of which shall be determined by the award of two arbitrators, or their umpire, in the usual manner, and the costs of making such valuation shall be paid by the surviving partners and the executors or administrators of the deceased partner, according to their respective proportions in the said partnership business.

In witness, etc.

PARTNERSHIP AGREEMENT

Article of Agreement, Made the _____ day
of _____ one thousand nine hundred and _____
Between _____

as follows: The said parties above named have agreed to become
copartners in business, _____ and by these presents do
agree to be copartners together, under and by the name or firm of

in the _____
to the said business belonging, and to occupy the

their copartnership to commence on the _____ day of _____
and to continue _____

and to that end and purpose the said

to be used and employed in common between them, for the support
and management of the said business to their mutual benefit and
advantage. **And** it is agreed by and between the parties to these
presents, that at all times during the continuance of their copartner-
ship, they and each of them will give their attendance, and do their
and each of their best endeavors, and to the utmost of their skill and
power exert themselves of their joint interest, profit, benefit and
advantage, and truly employ, buy, sell, and merchandise with their
joint stock, and the increase thereof, in the business aforesaid.
And also, that they shall and will at all times during the said
copartnership, bear, pay and discharge equally between them, all
rents and other expenses that may be required, for the support and

management of the said business; and that all gains, profit, and increase, that shall come, grow, or arise from or by means of their said business, shall be divided between them

and all loss that shall happen to their said joint business by ill commodities, bad debts or otherwise, shall be borne and paid between them.

And it is agreed, by and between the said parties, that there shall be had and kept at all times during the continuance of their copartnership, perfect, just and true books of account, wherein each the said copartners shall enter and set down, as well all money by them or either of them received, paid, laid out and expended in and about the said business, as also all goods, wares, commodities and merchandise, by them or either of them, bought or sold, by reason or on account of the said business, and all other matters and things whatsoever, to the said business and the management thereof in anywise belonging; which said books shall be used in common between the said copartners, so that either of them may have access thereto, without any interruption or hindrance of the other. **And also,** the said copartners, once in

or oftener if necessary, shall make, yield and render, each to the other, a true, just and perfect inventory and account of all profits and increase by them, or either of them made, and of all losses by them, or either of them, sustained; and also all payments, receipts, disbursements, and all other things by them made, received, disbursed, acted, done, or suffered in this said copartnership, and business; and the same account so made, shall and will clear, adjust, pay and deliver, each to the other, at the time, their just share of the profits so made as aforesaid.

And the said parties hereby mutually covenant and agree, to and with each other, that during the continuance of the said copartnership, neither of them shall nor will endorse any note, or otherwise become surety for any person or persons whomsoever, without the consent of the other of the said copartners. **And** at the end of the time hereinbefore mentioned, or other sooner determination of their copartnership, the said copartners, each to the other, shall and will make a true, just and final account of all things relating to their said business, and in all things truly adjust the same; and all and every the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods wares, fixtures, debts or otherwise, shall be divided between them.

PARTNERSHIPS

Definition—General Nature—Powers of Partners—Rights and Remedies of Creditors—Duties and Liabilities of Partners inter esse—Dissolution—Accounting and Distribution—Limited Partnership—Special Partners—Partnership Association—How Dissolved.

THE general tendency toward the concentration of capital characteristic of the present age renders the subject of partnership associations of widespread interest to the general business public and the law applicable to their regulation becomes a matter of considerable importance to those engaged in either mercantile or professional pursuits.

When two or more parties agree to form a partnership, they incur certain responsibilities, both individually and collectively. It consequently becomes essential to investigate the status of a partnership in order to definitely ascertain when such a relationship may be said to exist, which is a matter of no inconsiderable difficulty. For example, an agreement between two or more to share the profits of a certain enterprise does not necessarily constitute a partnership. If John Doe lends Richard Roe a certain sum of money with which to engage in business, in consideration of which Richard Roe agrees to allow John Doe sixty per cent. of the net profits of said business, he does not thereby become a partner. A trader, by undertaking to pay a creditor a certain share in the net profits of his business, does not make such creditor a partner, nor does an assignee of a debtor's share in a firm become a partner therein although entitled to a share in the net profits. Therefore, the fact that two parties agree to share in the profits of a joint enterprise is not conclusive evidence of the existence of a partnership.

What then, is the true test by which we may determine whether or not a partnership exists? A partnership is created by the agreement, either expressed or implied, between two or more parties to carry on a business in common with a view to profit. Parties may, however, subject themselves to the liabilities of partners in the absence of any intention to become such, but if they hold themselves forth to the public as partners, receiving credit as such, they cannot avoid responsibility to those

deceived by their actions. It is the function of the Court to determine whether or not individuals associated together in business are partners and the Court is guided in its determination by the maxim that "Actions speak louder than words."

Whether or not coproprietorship is exercised by those interested in a business is another means by which we test the existence of a partnership, but inasmuch as several elements enter into the formation of every partnership relation no single test can be made definite. However, when two or more parties engage in business together, exercise joint control over the firm business, have a common property in the assets of the firm, and share in the profits or losses of the business, either equally or in proportion to their respective contributions thereto, a legal partnership will be said to exist.

A partnership agreement will be invalidated if any of the partners are shown to be legally incompetent to enter into a contract. The contractual incapacity of certain classes of individuals has been largely removed by recent statutes, so that in Pennsylvania to-day lunatics, minors, alien enemies and corporations in the absence of charter authority are the only exceptions to those capable of entering into a contract of partnership.

As we observed in contracts, a consideration is necessary to support every agreement, so an agreement to form a partnership must impose mutual obligations upon its members to be binding upon them.

To summarize, the formation of a partnership may be effected by an agreement, supported by a consideration, between two or more parties having legal capacity to contract, jointly to conduct a business the profits of which are to be shared between them.

General Nature of a Partnership.

Having determined the general principles which govern the formation of a partnership, our next inquiry will be directed to ascertain what status it acquires; what is the general nature of a partnership? The law of Pennsylvania does not consider a partnership as a separate entity distinct from the members composing it, but regards it rather as a collection of individuals operating under a common name. A partnership might, however, transact business without the adoption of a firm title, although a name is ordinarily agreed upon. The firm name may be that of either one or all the members thereof, or may be purely fanciful. At

common law no individual or body of persons can acquire the exclusive right to a name, but a Court of law will restrain a partnership from using the same name as another firm in the same business, where to do so would operate as a fraud upon said competitor or the public.

When a firm has adopted a name, the authorized signature of the partnership is in the eyes of the law the signature of each partner, and conversely notes signed with the individual names of the partners or with the name of but one of them will bind the firm if they were issued as firm contracts. If the partnership has adopted an arbitrary name, which is not that of a natural person, a deed of real estate to the firm passes no title at law, it being necessary for such a firm to take title in the name of one of its members.

The title acquired by a partnership to property in general vests in the firm, but as a firm has no separate existence in law the individual members of the firm are in theory regarded as trustees of the firm property for the benefit of firm creditors. A partner's interest in a partnership is his right to share in the firm assets after payment of all firm creditors and the adjustment of the accounts between the partners. Thus if one partner sells his interest in the partnership, he does not transfer title to the firm property, nor is the firm property subject to execution upon judgment obtained by an individual creditor of one of the partners, the execution only reaching the individual partner's interest in said firm property.

It is well settled that partnership real estate is regarded as personalty for the purpose of satisfying claims of firm creditors. This in reality is in the nature of an equitable conversion; hence a wife's dower does not attach to real estate immediately upon its acquisition by the firm of which her husband is a member, but attaches to such real estate as remains after payment of firm debts and the adjustment of the partner's equities. It will also be observed that partnerships cannot claim the benefit of the exemption law reserving to debtors property to the value of three hundred dollars from exemption, which is altogether a personal privilege.

A firm may at any time dispose of its property in the ordinary course of business with the limitation that firm creditors be not defrauded thereby. That each partner is liable for firm debts to the extent of his individual fortune is unquestioned, and consequently firm creditors are not defeated by the transfer of firm property, provided one or more of the partners remain sol-

vent. Each partner is an agent of the firm, and the act of one partner is the act of the firm and binding upon all. A partner, to bind his co-partners, must, however, act within the scope of the partnership business. The law in this regard is to the advantage of the partnership and greatly enhances its credit in the mercantile world. Thus one partner cannot sell the entire partnership property to the injury of the firm, although a partner's power to transfer title to firm property is regulated largely by the nature of its business, and is usually limited to trading partnerships. The weight of authority also upholds the right of one partner to create a valid mortgage or other lien upon firm property. One partner is not permitted, however, to introduce another member into the firm without the acquiescence of his co-partners, as mutual confidence in the character of a partner lies at the foundation of every partnership agreement.

Liability.

In the event of the death of a partner his estate is liable for firm debts, and if necessary the surviving partner or partners may appropriate his interest in the partnership toward the liquidation of the firm's indebtedness. As we will later learn, the death of a partner operates as a dissolution of the partnership, but the title to firm property devolves upon the surviving partner by operation of law. The surviving partner is not, however, in any sense the assignee of the deceased partner's interest, but is required to account to the representative of the deceased for the latter's share.

As the firm title vests in the surviving partner, he can transfer it to a trustee for the benefit of creditors without the necessity of obtaining the consent from the representative of the deceased.

Whether one partner can make a general assignment of the partnership property for the benefit of creditors, thereby divesting the firm title, is a question upon which the authorities are somewhat unsettled. The view generally entertained is that a transfer of the entire firm property to a trustee for creditors is not "an act done for the purpose of the business of the partnership," and that an agency to do such an act does not result from the partnership relation. The better authority supports the doctrine that the partner desiring to make a valid assignment for creditors must secure the consent or ratification of his co-partners. If an assignment becomes imperative, and certain of the part-

ners are not accessible or are without the jurisdiction, an assignment by one partner will be upheld if made in good faith. We observed above that the real estate owned by a partnership was, by virtue of a fiction of law, regarded as personal property, retaining the nature of personalty as long as the partnership exists. Upon the death of a partner the real estate assumes its true character and money derived therefrom is payable to the heir of the deceased rather than an executor, it being a fundamental principle of law that real estate descends to the heir and personalty to the representatives of the deceased.

Partnership property and partnership creditors are distinct from the individual property of its members and their individual creditors. It frequently occurs that the claims of firm creditors and those of individual creditors conflict. The question, therefore, naturally arises, when a firm becomes insolvent, upon what basis will the firm and individual property of the partners be distributed to the two sets of creditors? Partners subject themselves to a double liability; in the first place, partnership property is liable to the creditors of the partnership to the extent of the partnership indebtedness, and if the firm property is insufficient to satisfy firm creditors, the personal property of the partner becomes liable. If one partner is compelled to pay the firm debts he may compel his co-partners to share his loss by a bill in equity. A firm creditor will not be allowed to satisfy his debt out of the separate property of a partner to the exclusion of the individual creditor of a partner, the principle to be applied in such cases providing that firm creditors shall have priority over firm property and individual creditors over the individual property of the debtor partner. When, however, the firm property is insufficient to satisfy firm creditor, he may have recourse against the separate property of a partner, providing his separate creditors have been paid. In the event of a firm owning no property, firm creditors are allowed to share equally (*pari passu*) with the separate creditors the property of the several partners.

Powers of Partners.

The general powers of partners are implied from the partnership relation, and need not be set forth in the partnership articles, each partner being "the general and accredited agent of the partnership" in the management of its business.

To clearly understand the scope of a partner's agency it is necessary to distinguish the existence of the firm as a separate

entity from the existence of the partners composing it. Strictly speaking, one partner does not act as the agent for the other partners, but as the agent of the firm of which they are members.

Every general partner is regarded as the agent of the partnership in the transaction of the firm's business. As such he has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his co-partners by his acts.

The powers of a partner are regulated largely by the nature of the partnership business. A partner in a firm engaged in buying and selling goods has implied authority to dispose of the entire stock of goods, but a partner in a firm of farmers has no power to sell the animals which have been bought by the firm and are necessary for use in cultivating the farm. Again, if a partnership is formed for the increase and improvement of a flock of sheep or cattle, a partner would have no power to dispose of the entire flock. Thus it will be seen that the powers of a partner depend upon the nature of the partnership business.

In those cases where a partner has power to sell firm property he may bind his firm by all such acts as are incidental to a sale. For example, if a partner should sell a certain lot of fruit trees and should agree that the purchaser need pay for only those trees which live, such a statement, being incidental to the sale, would be a condition binding upon the partnership. Agreements made by a partner in selling goods with reference to their fitness for a particular purpose or their quality will be binding upon the firm, being incidental to the sale.

This power of sale which exists in every normal partnership may be relinquished by one or more of the partners, either by an express agreement to this effect or by conduct. An agreement by a partnership composed of A, B and C provided that A and B were to have the entire management of the firm's business, while C was not to interfere therein in any way. Under this agreement C's power of agency was abandoned. If the terms of this agreement were known to the world, as is the case of joint-stock companies, or was known to those dealing with the firm, C would not be able to bind the partnership by any acts, even though within the scope of the partnership business.

If a partner sells his interest in the firm, or permits it to be sold on legal process, his agency for the partnership is terminated.

We have observed that a partner's power of sale is limited to transactions connected with the firm's business, and conse-

quently a sale of firm property by a partner to pay his individual debts will be invalid, unless actual power to do so was given him by his co-partners and no firm creditors be defrauded thereby.

The scope of a firm's business within which the power of a partner is limited depends upon its nature, and is determined by the usual and ordinary course in which it is carried on by those engaged in it in the same locality. Thus it has been held that a member of a firm of machinists has no implied authority to bind the firm by a promise to pay to a fund of an association organized to keep a harbor free from ice, because to do so would not be an act within the ordinary course of the firm's business.

It would be impossible to enumerate the various acts which a partner is authorized to do, and which would bind the firm. The nature of the partnership business is a question of fact to be decided by a jury upon a consideration of all the circumstances of each particular case. Our inquiry will be limited to the most important and characteristic powers possessed by a general partner.

The power of a party to purchase property on the credit of the firm has never been questioned in the case of an ordinary commercial partnership. Such a relation could not serve the purpose for which it was organized unless the partners had power to pledge the credit of the firm for the price of goods and wares necessary in the business carried on by it.

A partner, whether in a trading or non-trading partnership, has the further power of binding the firm by contracts for the hire of such servants and employees as may be required to conduct the business properly. It is a general rule of law that an agent cannot delegate his authority to a sub-agent, but a partner in hiring a servant or employee does not act in the capacity of an agent. All the partners "are regarded as being present and sanctioning the engagements and contracts into which they may singly enter into within the scope of their partnership affairs."

Another general power incident to every normal partnership is the authority of each partner to collect the debts due the firm and give receipts or releases covering the same.

One partner may also bind his co-partner by instituting legal proceedings, and the act of one partner is the act of the firm. It is generally denied, however, that one partner has the power to bind his co-partners by the submission of a disputed question to arbitration, although in Pennsylvania the Courts will uphold this right.

Commercial partnerships are frequently compelled to nego-

tiate loans to carry on their business, and, therefore, each partner has the power to pledge the firm's credit in borrowing money for the purpose of its business. If this privilege is specially denied to one or more of the members of a firm, the power to borrow on the firm's credit being restricted to a particular member or members, any one having knowledge of this fact could not hold the firm liable for money loaned to one of its members not privileged to borrow the same.

In the case of a non-trading partnership, no member of the firm has the power to borrow money on its credit, such an act not being incidental to the business of such a company. If in the case of a firm of physicians, for instance, it becomes necessary to raise money, it must be raised by the individuals composing the firm, and not by one member thereof.

A member of a trading partnership may furthermore issue negotiable paper in the name of the firm, which will be binding upon the firm even if it was not issued for the purposes of the firm's business. This doctrine is based upon the principle that it would be manifestly unjust to require a *bona fide* holder of a bill or note indorsed by one of several partners to apply to each of the other partners to ascertain whether they consented to the indorsement. A member of a non-trading partnership has no such right to bind his firm by issuing negotiable paper of any kind, this power being limited to trading partnerships only.

The distinction between trading and non-trading partnerships is not recognized to the same extent in Pennsylvania as it is in most of the other States of the Union, but the distinction is, nevertheless, important. A partnership is regarded as a trading one if it contemplates the periodical or continuous purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased. Every trading partnership habitually indulges in buying and selling, but this fact in itself does not furnish the basis of a partner's power to bind his firm by negotiable paper, because if it was the custom of a particular firm to buy and sell for cash only no power to issue negotiable paper would be implied from the buying and selling feature of the business.

Firms of brokers, farmers, architects, ship carpenters, stevedores, livery stable keepers, theatre managers and real estate agents are among those judicially declared to be non-trading partnerships.

A partner has the power to bind his co-partners by admissions or representations made concerning the partnership affairs

and in the ordinary course of its business, in the absence of which authority a partner could not discharge properly his duties as agent for the firm. Consequently a statement by a partner of the amount due by the firm to a creditor or employee is binding upon the partnership. Such admissions or representations to be binding upon the partnership must be made in the ordinary course of business; otherwise, even though relating to partnership affairs, they will only be binding upon the partner making them, and not upon his co-partners.

It is a uniform rule of law that a partner has no authority to bind his firm by a deed. A deed, however, will be valid if the partner executing the same had received previous authority so to do by his co-partner or partners. Such deed would also be valid if subsequently to its execution it was ratified by the remaining partners.

A lease of partnership real estate by one partner in his own name enures to the benefit of the firm, the partners being agents of each other in the partnership business, and a lease of such realty when brought into the firm is as much a partnership transaction as the buying and selling of goods. The acts of one partner within the scope of his authority are binding on his co-partners, and if he acts in good faith, he is not responsible for any loss arising from mere mistake or error of judgment.

A Partner's Power to Render the Firm Liable in Tort.

We have thus far discussed the power of a partner to subject his co-partners to contractual liabilities, i. e., liability arising out of a contract, and have observed that this power is governed by the nature and scope of the partnership business. The same general principle applies with reference to a partner's power to bind his firm by his torts, which comprise all such unlawful acts which do not arise out of a contract, but for which the law provides the injured party with a right of action for damages against the wrongdoer. Even though the other partner or partners are wholly ignorant of the wrongful act of a co-partner, or even though they made every effort to prevent the same, they are nevertheless liable for the torts of any member of the firm provided the act was done in the ordinary course of the firm's business.

It has been held in some jurisdictions that acts or omissions in the course of the partnership business, which are in violation of the law, will only implicate those who are guilty, but the weight

of authority is to the effect that if the act or omission is illegal, the firm is liable. Thus if a member of a firm of warehousemen refuses to deliver the goods of a customer unless illegal fees are paid, the firm would be bound to pay damages for the wrongful or illegal act of one of its members. It has also been held that a physician is liable in damages for the negligent act of his co-partner in the treatment of a patient.

A partner has the power to institute and carry on ordinary legal proceedings for the recovery of firm property, the protection of its interests or the redress of its wrongs, and acts done by him in this connection will be binding upon the firm. To illustrate, if a partner in a suit against a firm debtor orders an attachment to be levied upon the goods of a third party, assuming that they are the goods of said firm debtor, his act is the act of the firm, and the partnership becomes liable therefor.

A partner may also bring criminal proceedings against anyone wronging the firm without consulting the remaining partners, provided action is taken upon probable cause and without malice. If, however, a partner secures the arrest and imprisonment of a person, not in performance of any duty owing to the firm of which he is a member, but merely in the performance of his duty as a citizen, the partner so acting is alone responsible for his acts.

The firm and every member of it are responsible in damages for the fraudulent acts of one of the partners done in the ordinary course of the partnership business. Suppose, for example, that goods are delivered to a firm of commission merchants for sale, and one of the members of the firm should, by fraudulent representations regarding the buyer's financial standing, induce the owner to make a credit sale to a third person, the mere fact that the co-partners were ignorant of the false representations would constitute no defense to an action for damages on the part of the injured party.

Likewise if one partner publishes a libel or is guilty of a slander, made to secure some advantage to the firm, the partnership will be liable. In a well-known case one member of a firm of furniture dealers published the following placard upon a piece of furniture: "This was taken back from Dr. ———, as he would not pay for it; for sale at a bargain. Moral—Beware of dead beats." Although it appeared doubtful whether the above was to be regarded as a firm advertisement, the Court held that the libelous matter was published for the purpose of venting the personal spite of one of the partners, and consequently the other partner, who knew nothing of the matter, was exonerated from

liability. If a partner in a manufacturing business publishes the false statement that a rival manufacturer is infringing a patent which they own, that an injunction has been issued and the competitor's business closed up, this is a representation directly appertaining to the firm's business, and therefore every member becomes liable.

It must be borne in mind that, although every member of a firm is liable in damages for the tort or wrongful act of a co-partner, if committed in the course of the partnership business, only the member actually guilty of the wrong is punishable by imprisonment. A warrant cannot be obtained for the arrest of an innocent partner by one who has been defrauded by the fraudulent statements of a co-partner. In view of the liability of every partner for the acts of one, a man to be protected should exercise prudence in choosing a partner.

Powers of the Majority.

In partnerships composed of several members the decision of the majority is binding upon all the partners whenever disputes or differences arise. The majority must, however, act in good faith, and their decision is only binding in matters directly relating to the ordinary business of the firm. For example, the majority in a partnership cannot bind the minority by a decision to buy and sell spirituous liquors if this power was not included in the original agreement of the partnership. Likewise a majority of the partners has no power to change the location of the firm's place of business.

Where in a partnership composed of but two members one attempts to do an act objected to by the other, the dissenting partner may protect himself by disclaiming liability for the act, and anyone receiving such notice would be unable to hold him liable for the act of his co-partner which he repudiated.

The powers of a partner after dissolution will be treated under the head "Dissolution," to be discussed later.

Rights and Remedies of Creditors.

Firm creditors are also creditors of the individual partners composing it, the members of a firm being not only jointly liable but also liable to the extent of their individual fortune for all firm obligations. Hence the question to engage our attention will relate to the rights and remedies of the creditors of a partnership.

As pointed out heretofore, the law does not regard a partnership as a separate entity, like a corporation, but regards it rather as a collection of individuals associated together in a business in common with a view to profit. Consequently all actions brought against a partnership must be brought against the individual members composing it. In view of this fact, judgments obtained by a firm creditor constitute a lien against and is binding upon both the firm property and the property of every partner.

Partnership property must be appropriated to the payment of partnership debts, and a creditor of one partner has no claim to the partnership assets until the partnership debts have been first paid. An attachment made by a creditor of one partner will be subject to the paramount claims of the partnership creditors. For example, if a creditor of A attaches his interest in the property of A, B and Company, and a creditor of A, B and Company attaches the same property, the first attachment is postponed to the second. In other words, the debt of the second or firm creditor must be fully paid, after which the first or individual creditor would be permitted to have his debt satisfied out of the surplus left.

If firm property is transferred in fraud of firm creditors, an attachment will issue against the firm and every member thereof. If, however, one partner applies partnership property to the payment of his individual debts, thereby fraudulently withdrawing the property from firm creditors, without the knowledge or consent of his co-partners, an attachment would not lie against the firm in the absence of any participation in the fraudulent act of the co-partner.

Suppose in an action for deceit, a creditor issues an attachment against the firm, the question arises, "Can he also issue an attachment against the property of an innocent partner?" The Courts have decided in the affirmative where the culpable partner was acting within the scope of the partnership business.

Effect of a Novation.

The right of a partnership creditor to bring suit against the partners composing it, and to enforce judgment against their separate properties as well as the property of the firm, cannot be prejudiced by the withdrawal of a partner or an agreement that one or more shall assume all liabilities.

If, however, a party should be admitted as a partner into an existing partnership, a novation is effected and the new part-

ner is not liable to firm creditors for debts or liabilities incurred before he became a partner. On the other hand, a partner who retires from a firm can only be relieved from liability by an agreement to that effect between himself and the members of the firm and the firm creditors. A creditor may substitute the liability of a new partner or accept new security from the remaining partners for that of the old partnership, provided, of course, such an agreement is supported by a legal consideration.

In view of the fact that many partnerships have dormant or silent partners, it becomes essential to inquire into their liability with reference to firm debts. If, subsequent to obtaining judgment against the ostensible partners, a firm creditor discovers the existence of one or more dormant partners in the firm he may lawfully proceed to judgment and execution against said dormant members. A dormant partner is equally liable with the active partners upon negotiable paper issued in the firm name. Thus, a bank which has discounted a bill or note in the name of the ostensible partner or partners can recover against the dormant partner, even though it was ignorant of the latter's connection with the firm when it discounted the paper.

Termination of Dormant Partner's Liability.

We observed above that an ostensible partner is required to give notice of his withdrawal from the firm to avoid liability for subsequent obligations incurred by the firm. It is different, however, in the case of a dormant partner, who is not required to give notice of his withdrawal from the firm, for the reason that his connection with the firm being unknown, its credit was not increased by his membership therein. The public would not, therefore, be misled by the omission of the dormant partner to give notice of his withdrawal from the firm.

A dormant partner is one whose connection with the firm is unknown and who takes no active part in the management of its business, both secrecy and inactivity being implied by the word. If a member of a partnership is active in its business, but his connection therewith is unknown, he would be obliged to give notice of his withdrawal to every customer who dealt with the firm while he was a member. Such a silent but active partner would owe no such duty to those who never dealt with the firm during his connection therewith.

Separate Creditor's Remedy.

It has been pointed out that the members of a partnership are jointly and severally liable for all firm debts. In other words a firm creditor may proceed against the partnership property or the property of every individual member thereof at his option. Let us now consider briefly the rights, not of a firm creditor, but of the individual creditor of one of the partners.

What principles are to be applied when a separate creditor attempts to proceed against firm property in order to reach a partner's interest therein? At the beginning of this discussion we noted that a partner's interest in a firm consisted of the right to share in the assets of the firm after payment of all firm creditors and the adjustment of the equities of the partners. In view of this doctrine, a separate creditor of one of the partners might secure a judgment and levy upon the partnership property; nevertheless if firm creditors should subsequently issue executions sufficient to exhaust the firm property, the separate creditor's previous execution would be of no effect.

Although a separate creditor may issue an execution against the entire firm assets, he acquires no legal interest in said assets. If the firm should become bankrupt or make an assignment for the benefit of creditors subsequent to the separate creditor's levy, title to the firm assets would pass to the assignees. Such assignees could dispose of the partnership effects free from the lien of the separate creditor's levy.

By application to a Court of Equity, the creditor of an individual partner may obtain a partnership accounting to ascertain the interest which the debtor-partner may have in the firm. The purchaser of a debtor-partner's interest in the firm property under a separate creditor's execution does not become a partner in the debtor's place.

The weight of authority in this country is to the effect that the sale of a debtor-partner's interest in a firm operates as a dissolution of the partnership, and gives the purchaser the right to have a final settlement and adjustment of the partnership affairs.

The Rights of Creditors in Equity.

We learned in the course on contracts that a Court of Equity had power to administer justice in all cases in which the remedy provided in a Court of Law was insufficient. In administering the firm estate and the separate estates of the part-

ners composing it, a Court of Equity proceeds upon different principles from those that control a Court of Law.

It will be recalled that in law, a firm creditor who obtained a judgment could execute it against firm property or the separate estates of any of the partners. In Equity a different doctrine prevails providing that as the separate creditor cannot come in on the partnership estate until all firm creditors are paid, firm creditors cannot participate in the separate estates of the partners until their individual creditors have been first paid. In other words, firm creditors are given priority over the firm estates, and separate creditors are given priority over the separate estates of the partners.

This doctrine regulating the settlement and distribution of both the partnership estate and the separate estates of its members has been embodied in the Federal Bankruptcy Law of 1898, which is in force throughout the country.

In the event that there is no partnership estate and no living solvent partner, creditors of the firm are permitted to share equally with the individual creditors in the separate estate of the bankrupt partners. If, instead of the firm becoming bankrupt, one of the partners is adjudged a bankrupt, a somewhat different situation is presented. The United States Bankruptcy act of 1898 provides in such cases as follows:

"In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

Until the present bankruptcy law of the United States was enacted the decisions were at variance as to whether the discharge of a partner in bankruptcy would relieve him from liability for firm debts. The present bankruptcy statute, however, clearly settles this point, in that it takes from the bankrupt partner his share in the firm assets and permits firm creditors to prove their claims against his estate, and further provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides, (2) on judgments in actions for fraud or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, (3)

have not been duly scheduled in time for proof and allowance with the name of the creditor, if known to the bankrupt, unless such creditor had notice or knowledge of the proceedings in bankruptcy, or (4) were created by his fraud, embezzlement, misappropriation or defalcation, while acting as an officer or in any fiduciary capacity." Such debts are never discharged by a bankruptcy proceeding.

It is possible under our present bankruptcy law to adjudge a partnership bankrupt while the partners composing it remain solvent, the act setting forth that any person guilty of certain acts may be declared bankrupt, and further that the word "person" shall include "partnerships."

In the accounts of a partnership the firm is, of course, a debtor to each partner to the extent of said partner's contribution thereto, and the Federal Bankruptcy statute permits proof of the claim of an individual partner against the firm, and *vice versa*.

Neither a solvent partner nor the estate of a bankrupt partner can prove against a co-partner's estate in competition with firm creditors.

Upon the death of a partner, all partnership debts being joint and several, a creditor may proceed for the collection of his debt against the surviving partners or against the estate of the deceased partner. As the surviving partners succeed to all the rights and interests of the partnership, some authorities hold that partnership creditors must first proceed against the assets of the firm, as the primary fund for the payment of firm debts, and deny the right to the creditor to proceed in the first instance against the deceased partner's estate unless the firm assets are first exhausted.

Duties and Liabilities of Partners Between Themselves.

The first and most important obligation imposed upon a partner, and that which lies at the very foundation of the partnership relation, is the duty to exercise fairness and good faith toward his co-partners. It is unnecessary to provide in the partnership articles that this be done, as the duty is imposed by virtue of the relationship as partners.

This doctrine extends to negotiations preliminary to forming a partnership. For example, assume that a partnership is to be formed for the purpose of purchasing certain property with a view of selling the same for a profit. If a party to this agree-

ment secured title to the property before the partnership was organized, a Court would compel him to transfer the property to the firm at the same price which he paid for it. As a further illustration, if one partner induces another to enter into partnership with him by false representations with reference to the property which has been contributed to the business, the deceived party may have the partnership contract annulled and recover what he put into the firm. He does not have to establish actual damage, but is released from the partnership relation on the ground that his confidence was betrayed.

The law will not permit a partner to derive any private profit or advantage from any transaction connected with the partnership business. All secret commissions paid to a partner on firm purchases or firm sales are firm property and may be recovered as such.

If one of the partners without the knowledge or consent of his co-partners engages in a business which is in competition with that which the firm was organized to conduct, he may be compelled to account and turn over to the firm such profits as were realized by him from such competing business.

As a result of the complicated nature of modern business relations, it frequently occurs that a member of one firm is also a member of several other firms carrying on distinct lines of business. But in the absence of an agreement that a partner shall devote his entire time and attention to the business of a single partnership, there is no liability on his part for engaging in any other business which is not in competition with that of the firm of which he is a member. Thus the Courts have held that a member of a firm of warehousemen would not compete with his partnership in owning and managing wharf boats. This question is sometimes a difficult one as is illustrated in the case of a firm of real estate brokers, where one member purchases and sells real estate as an individual speculation, but it has been held that to do so does not contravene the principle under discussion.

Ordinarily partnership articles provide that the partners composing it shall devote their entire time and attention to the firm business, and consequently a partner has no right to extra compensation for extra time and services devoted to the business.

One partner cannot sue his co-partner at law upon a matter which is properly an item in the partnership account. Action may, however, be brought upon proper cause for a dissolution of the partnership and an accounting. One partner may also sue his co-partner for a tort or personal wrong done him. Thus, for

example, a partner may sue a co-partner who wrongfully injures the plaintiff's separate property, although it was at the time in the possession and use of the partnership.

An action could not be maintained at common law between firms having a common member, on the ground that it was necessary for all the partners to join in an action and the common member could not at the same time be both a plaintiff and a defendant. This doctrine no longer prevails, and consequently the fact that a partner in the plaintiff firm is also a member of the defendant firm will not prevent an action being brought by one against the other.

Having considered the manner in which a partnership may be formed, its general nature, the powers possessed by the partners composing it, and the rights and remedies of creditors, our next inquiry will be directed to ascertain how a partnership may be dissolved and an accounting and proper distribution of its assets effected.

It is not necessary that the partners in a firm agree to dissolve or that a judicial decree be made to this effect. The happening of any event which makes it unlawful to carry on the firm business any longer dissolves the partnership by operation of law. For example, if a partnership exists between a citizen of the United States and a citizen of Japan, upon a declaration of war between these two countries, the partnership would be immediately dissolved, as it would be impossible, in view of the allegiance which each partner owes his respective country, to subserve the ends for which the partnership was formed. Likewise in a jurisdiction where a Judge is prohibited from practicing law, a partnership of attorneys is dissolved by one of its members qualifying as a Judge.

The death or bankruptcy of any partner also operates as a dissolution of the partnership. A decedent's estate passes by operation of law to his personal representatives, and a bankrupt's estate to the trustee in bankruptcy. As neither the personal representative of the deceased partner nor the trustee of the bankrupt partner's estate has the right to enter the firm without the consent of the other partners, the death or bankruptcy of a partner necessarily dissolves the firm.

The surviving partners may agree to carry on the firm business, but as the personal qualities of each member of a firm enter into the inducements which led the parties to form a partnership, if these inducements are withdrawn by the death or bankruptcy of a partner, the original contract of partnership is

terminated and, being a public fact, every one is bound to take notice of it.

A single woman, who is a member of a partnership, may, after marriage, continue as such with the same powers and privileges she possessed beforehand.

Dissolution by Act of Parties.

If in the partnership articles it is provided that the partnership shall exist for a fixed period of time, it is dissolved by the expiration of the time limited. If after the expiration of the original term of the partnership the partners continue to transact business without entering into any new agreement as to time, it becomes a partnership at will and the partners possess the same rights as under the original agreement. Such a partnership may dissolve at any time by consent of all the partners, either express or implied.

If partnership articles provide that the firm shall be incorporated as soon as possible, the incorporation of the company will work a dissolution of the partnership. A partnership formed for a single transaction is dissolved upon completing the contemplated business.

If a partner, under an agreement to carry on a business for a specific length of time, withdraws from the partnership before the expiration of the term for which it was formed, without the consent of his co-partner, he becomes liable to pay such damages as his co-partner sustains on account of his breach of agreement.

Lunacy of a Partner.

If one of the partners in a firm becomes insane and is adjudged a lunatic by the Court, the partnership is not immediately dissolved, but the lunacy of one partner affords ground for an application to dissolve on behalf of the sane partner or the representative of the lunatic partner. Likewise the permanent incapacity of a partner rendering him incapable of performing his duties as a partner, justifies a Court in dissolving the partnership upon application of the other partner, the same as in case of lunacy.

Furthermore, misconduct by one partner, which tends to injure or ruin the firm's business, or continued failure by one partner to perform his part of the partnership agreement, will

support an application to dissolve upon proof that the business is a failure and can only be carried on at a loss.

A notice of dissolution published in a newspaper in the city or county where the partnership business is being carried on is sufficient notice to all persons who have not had previous dealings with the firm so as to relieve a withdrawing partner from liability for future debts of his co-partners transacting business under the old firm name.

The dissolution of a partnership puts an end to the surviving partner's authority, and revokes all power to create new contracts, hence he cannot by express promise take a debt out of the Statute of Limitations so as to make the partnership liable.

The surviving or liquidating partner is not entitled to compensation for winding up the partnership business, but is entitled to all necessary expenses incident to effecting a legal settlement of the partnership business.

Accounting and Distribution.

We have now seen the various ways by which a partnership may be dissolved. What, we next ask, are the rights and obligations imposed by virtue of the dissolution of a partnership upon the members composing it?

When a partnership is dissolved in any of the ways heretofore mentioned the first object sought to be accomplished by a partner is to obtain an accurate accounting as to all dealings and transactions connected with the firm's business. Equity always favors the exercise of his right to an accounting by a partner, in order that the surplus assets may be properly distributed, or if the account proves the firm to be insolvent, or a partner a debtor thereto, proper contribution may be exacted.

Method of Distribution.

A partnership account is required to set forth in detail the entire amount of the firm's assets and liabilities, and the surplus to be distributed among the partners is the balance remaining after payment of all firm creditors, who, as we have learned, have a prior claim upon the firm's property. Losses sustained in the business shall be first paid out of the profits, next out of the capital, and lastly, if necessary, by the partners individually in the proportion in which they are entitled to share profits. The assets of the firm shall be applied, first, in the payment of the debts and liabilities of the firm, to those not partners therein;

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second, in payment of amounts advanced by the partners as distinguished from contributions of capital; third, in payment of the amounts contributed by each partner as capital and, lastly, the surplus shall be divided among the partners in the same proportion to which the profits are divided. It may, of course, be provided in the partnership articles that the annual profits shall be added to the capital, instead of being appropriated to a separate fund. Again, certain of the partners in a firm may only contribute services and experience, while others put up the capital, and it may be agreed that upon a dissolution of the partnership, the firm's assets shall be divided equally between the partners after payment of firm debts. It will thus be observed that the parties may, by special agreement, change the method of distribution, but in the absence of any such agreement the Courts will distribute the partnership assets in accordance with the rules above stated.

If a partner has failed to contribute his share of the capital, or has made overdrafts on the firm, he cannot compel his co-partner to pay out of his individual estate firm debts, until he has first repaid his overdrafts and paid in his share of the capital. If the fund then available for payment of firm debts is insufficient, the partners must bear the losses in the proportion in which they are entitled to share the profits.

Repayment of Advances.

We have referred above to advances which one partner may from time to time make to the partnership business. A partner making such advancements is entitled to be reimbursed by his co-partners, and such reimbursements are required to be made before the partners will be repaid the amount contributed by them as capital.

Property contributed by the partners vests in the firm, and consequently, if upon final settlement of the partnership affairs, the assets of the firm are insufficient to satisfy this indebtedness, the partners must bear the loss in the same proportion as other debts of the partnership are borne by them. If the entire capital is contributed by one partner, and the firm assets are insufficient to pay the same, the partner paying in the capital is entitled to contribution from his co-partners, and is a creditor of the firm to the amount of capital contributed by him thereto.

In case one or more of the partners becomes insolvent, the solvent partners must bear the losses in capital, the same as other

partnership losses. If certain of the partners are non-resident, and cannot be reached by writ from the Court within whose jurisdiction the partnership business is located, the resident solvent partners must bear the losses in proper proportion.

Interest on Capital.

Ordinarily interest cannot be recovered on capital contributed by the partners, but when the contributions of capital are unequal the articles of co-partnership often provide that the same shall bear interest at a specified rate. In the absence of such a provision, interest on capital will not be allowed.

Adjustment of Equities Between Partners.

It has been pointed out that the individual creditors of a partner have only a right to his individual interest therein, which, as we have repeatedly stated, is his "share of what may remain after payment of the partnership debts and after a settlement of the accounts between the partners." It therefore follows that if one partner is more indebted to the firm than his co-partner, his share will be encumbered by a lien to make good such deficit to his co-partner.

Interest Payable by a Partner.

If the account shows that one partner has appropriated firm assets to his own use, or has neglected to account to his co-partners for firm property put in his hands for the purpose of winding up the firm affairs, he will be liable to pay interest as part damages for wrongfully detaining money due his co-partners.

Cost of an Accounting.

As it is necessary in winding up the affairs of a partnership to have an accounting, the costs of such are payable out of partnership assets. If there are no funds with which to meet this expense, the partners will have to bear the same equally.

Partnership Good Will.

After a firm has been established in business for a considerable time it frequently acquires a reputation for its integrity, the quality of its wares or products, etc. This reputation constitutes

what is known as the "good will" of the business. The good will of a business is property transferable like any other species of property, and may be realized upon as an asset of the firm.

It is seldom that the good will of a firm is valued at the annual or semi-annual stock taking and entered upon the books as its most valuable asset. Upon dissolving a partnership each partner has the right to compel the sale of the good will of the business and have its value included in the account.

The purchaser of the good will of a partnership should protect himself against the possibility of the surviving partner or partners engaging in the same business after winding up the affairs of the old partnership. Such a contingency would, of course, impair the value of the good will purchased.

If no provision has been made to the contrary the purchaser of the partnership property becomes the owner of the good will, and has the sole right to hold himself out as the successor to the business of the old firm, but, although the purchaser of a partnership has the right to hold himself out as the successor of the old firm, he must be careful not to use his predecessor's name in such a way as to expose any member of the former firm to any liability.

Appointment of Receiver.

If for any of the reasons we have learned it becomes necessary to dissolve a partnership, a receiver may be appointed to carry on the business until such time as it may be sold to best advantage. A receiver will be appointed in such cases where to wind up the business of the partnership immediately would entail loss. Pending the winding up of the partnership business by the receiver every partner will be restrained from carrying on the same business. A partner may, however, engage in a similar business if he conducts it as his own and in a manner indicating that it is not the business of the old firm.

At common law a partner was not allowed to limit his liability for firm debts to his contribution to firm capital, each member of a partnership being liable for the entire partnership indebtedness. A stipulation in the partnership agreement that one partner should not be liable for firm losses beyond his contribution of capital thereto, although binding between the partners, would be no protection against the claim of any firm creditor.

Limited Partnerships.

The right to create limited partnerships, in which the liability of one or more of the partners, is limited to his contribution of capital, is the result of legislative enactment, and every limited partnership must be formed in strict compliance with the statute.

Although the statutes in the various States, regulating the formation of limited partnerships differ somewhat, the distinctive characteristic of a limited partnership is the fact that there must be at least one managing partner who is liable as a general partner for all partnership debts, together with one or more contributing partners who take no active part in the management of the business, who are only liable for firm debts to the extent of their contribution to its capital, and are known as special partners.

In order to form a limited partnership under the laws of the State of Pennsylvania, those composing the firm are required to execute a certificate setting forth the name under which the partnership is to be conducted, the general nature of its business, the names and addresses of all the general and special partners, distinguishing which are general and which are special, the amount of capital which each special partner contributes, and the period of time during which the partnership shall exist. Said certificate must be acknowledged by those signing the same and also recorded in the office of the Recorder of Deeds for the county in which the principal place of business of the partnership shall be located. An affidavit by one of the general partners must be made and filed setting forth that the amounts specified in the certificate have been paid in cash by the special partners. Furthermore, the general terms of such a partnership agreement must be published in two newspapers once a week for six weeks after recording the certificate.

With the exception that the statutes generally restrict the control of a special partner over the firm business and limit his liability for firm debts, a limited partnership is a true partnership and is regulated by the common law with reference to the rights, duties and liabilities of the partners. By very recent statute in Pennsylvania, a special partner may do business for the partnership and maintain a limited liability for its debts.

The object in view in authorizing limited partnerships is to stimulate and encourage trade. If the parties fail to comply strictly with the requirements of the statute, the special partners become general partners and are liable as such for all firm debts to the extent of their individual fortunes.

A limited partnership may be renewed beyond the time originally fixed for its duration, in the same manner as is required for its original formation, and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership.

It must be borne in mind, however, that a limited partnership is not an illegal association on account of failure to comply with the statutory requirements. Non-compliance with the statute does not render void contracts made with the firm or release a firm debtor from any obligation he may owe the firm. If business is conducted by a limited partnership before its certificate is filed and recorded a special partner is not rendered liable as a general partner for firm engagements entered into after a subsequent compliance with the requirements of the statutes.

Special Partners.

Assuming that a limited partnership has been duly organized in accordance with the statutes, it may be transformed into a general partnership, as regards creditors, without any new agreement between its members. Any interference by a special partner in the business affairs of the partnership beyond the powers conferred in him by statute will render such special partner liable as a general partner. A special partner usually has the right to examine the books of the partnership and advise as to its management, but any assumption of the powers of a general partner will forfeit his statutory exemption from personal liability.

Again, it is of the greatest importance to the general patrons of a limited partnership that the facts set forth in its registered certificate should not be changed. Hence any alteration in the names of the general partners, the nature of the business or the capital of the firm will operate to transform a limited partnership into a general one, with all the incidents thereof.

The weight of authority is to the effect that it is unnecessary for a special partner to join in a general assignment for the benefit of creditors.

The fact that a special partner has contributed to the firm capital does not entitle him to share with outside creditors in the firm estate. Such special partner has no greater rights against the firm estate than any other partner.

A limited partnership may be dissolved in any of the ways in which a general partnership may be dissolved, death or bank-

ruptcy of a partner or by expiration of the period for which it was organized, as set forth in its certificate.

The statutes regulating limited partnerships frequently extend the right to the members thereof to terminate the partnership prior to the date mentioned in the certificate, if they so desire. To accomplish this purpose, notice of the dissolution must be given by publication. The dissolution does not take effect, however, until the statutory publication has been completed.

Partnership Associations or Joint-Stock Companies.

The statutes of Pennsylvania, New Jersey and many other States authorize the formation of a second kind of limited partnership, in which responsibility for the debts of the association are limited to the capital subscribed. None of the partners in such an association is subject to any personal liability. All business is conducted through a Board of Directors or Managers, the association holds real estate, sues and is sued in its own name, rather than in the names of the partners composing it. Such an association may, moreover, adopt a common seal. In many respects a partnership association closely resembles a corporation, but the Courts prefer to treat them as a partnership. In view of the fact that a partnership association usually consists of a large number of members, it is given many of the powers incident to a corporation, but it is nevertheless a partnership, as is illustrated by the fact that no one can purchase the interest of a member and participate in the business of the association without the vote of a majority of the members in number and value of interest. Furthermore, no charter is granted to the members of a joint-stock company or partnership association.

The Law of Pennsylvania regulating joint-stock companies provides substantially as follows:

That whenever three or more persons desire to organize a partnership association for the purpose of carrying on any lawful business or occupation by subscribing and contributing capital, which capital shall alone be liable for the debts of such association, they may do so by executing a statement setting forth the names and the amount of capital subscribed by each member, the total amount of capital and when and how the same is to be paid in, the character of the business intended to be carried on and its location, the name of the association, which must conclude with the word "Limited"; the duration of said company and the names

of the officers selected to conduct the business. Such a statement, together with any amendments thereto, must be recorded.

The name of such an association, with the word "Limited" added, shall be affixed outside of the office or place in which the business of the association is carried on and its full name must be used on all contracts and official publications of said association. The omission of the word "Limited" in the use of the name of the partnership association shall render the members thereof individually liable for any indebtedness, damage or liability arising therefrom.

Such an association shall hold at least one meeting of its members every year, at which there shall be elected not less than three or more than five managers, one of whom shall be chairman (president), one the treasurer and one the secretary, or the office of secretary and treasurer may be combined in one person.

No liability greater than \$500 shall bind the association unless reduced to writing and signed by at least two of the managers of the association.

The association may, at such times and in such amounts as a majority of its managers may determine, divide the profits of its business, but the profits so divided shall not diminish the capital of the association.

Dissolution of Joint-Stock Companies.

A partnership association may be dissolved whenever the period fixed for its duration expires or whenever by a vote of a majority of its members in number and value of interest, it shall be so determined. Notice of such dissolution is required to be published six consecutive times in two newspapers of the proper county, and immediately upon the commencement of said publication of dissolution said association shall cease to do business, except such as is necessary to beneficially conclude its affairs.

Upon the voluntary dissolution of such a partnership association its property shall be distributed as follows:

1. In paying all wages for labor.
2. In satisfying its other indebtedness.
3. After liquidating its debts the assets remaining shall be distributed among its members in proportion to their respective interests.

Three liquidating trustees, not more than two of whom shall have been a manager of the dissolved association, shall be elected by the members of the association, and shall have full power to

settle the affairs of the association and to distribute its assets after payment of its debts among the members thereof.

The last form of business association which we will consider is that of corporations, the law regulating the organization and management of which will constitute the subject of our next inquiry.

PROXY

Know all Men by these Presents, That

of _____ do hereby appoint
to be _____ Substitute and Proxy for
and in _____ name and _____ behalf to vote at
election _____
and at _____ meeting of the Stockholders of said
_____ as fully as _____ might
or could were _____ personally present.

In Witness Whereof, _____ have hereunto set _____ hand
and seal this _____ day of _____ 19 _____

Witnesses present,

L.S.

STOCK SUBSCRIPTION PRIOR TO ORGANIZATION

Whereas, it is proposed to organize, under the laws of the
state of _____, a corporation to be known as _____, or
by such other name as the parties in interest may determine;

And, Whereas, it is proposed that said company shall have a
capital stock of _____ dollars and shall transact the
business of _____

Now, therefore, the signers hereto, in consideration of their
mutual promises, do severally agree to and with each other and
with _____, the promoter and founder of said company, that
they will take and do hereby severally subscribe to the capital stock of
said company to the amount of the par value of stock set opposite
their respective names.

This agreement is conditioned upon the procuring of said
_____ subscriptions of at least _____ dollars to said
capital stock on or before the _____ day of _____ 19 _____.

Date.	Names.	No. Shares.	Amounts.
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CORPORATIONS.

Definition—Classification—Formation—Liability of Stockholders—Transfer of Shares—Rights and Remedies of Stockholders—Dividends—Their Management—Dissolution.

FROM our study of partnerships, general, limited and joint-stock companies, it is obvious that there are certain disadvantages attending these forms of business associations which it is desirable to overcome. To meet the objects sought to be accomplished the law governing corporations has been developed so that to-day corporations constitute by far the most general and important form of business association known to the commercial world.

A corporation differs from a co-partnership in two important particulars. In the first place we have learned that a partnership is not regarded as a collective body, but as an association of individuals; in other words, a partnership cannot be considered distinct from the members composing it. A corporation, on the other hand, has a distinct personality of its own and exists separate and distinct from the members who compose it. This distinction is further illustrated upon the death of a member of one of these associations; in the case of a partnership the death of a member operates as a dissolution of the partnership, but in the case of a corporation the death of a member thereof has no effect whatsoever upon its *status*.

In the second place, every partner is personally liable for all debts contracted by the partnership, whereas one who purchases stock in a corporation, thereby becoming a member thereof, has no greater liability than is represented by the stock which he holds.

Likewise membership in a business corporation passes by the sale and purchase of stock, the consent of other stockholders being unnecessary.

A further distinction between a partnership and a corporation resides in the fact that in the former each member is an agent for the others and may bind them by acts within the scope of the partnership business; in the latter, however, the business is managed by particular agents selected by vote of the shareholders or members, and who alone have power to bind the company as agents.

Definition of a Corporation.

Having pointed out the principal distinctions between a partnership and a corporation, we are better able to intelligently consider a definition of a corporation. Innumerable definitions have been given of a corporation, the most comprehensive of which is as follows:

"A corporation is a collection of many individuals united in one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and of exercising a variety of political rights, more or less extensive, according to the design of its institutions, or the powers conferred upon it, either at the time of its creation or any subsequent period of its existence."

The well-known definition given by Chief Justice Marshall, to wit, "A corporation is an artificial being, invisible, intangible and existing only in contemplation of law," although easier to be remembered, does not give the clear conception of a corporation as the definition above quoted.

From the above definition it will be observed that when the law creates a corporation it calls into legal existence an artificial person, a legal entity with rights separate and apart from the natural persons who compose the same. Being an artificial person, it has no power to act until such power has been conferred upon it by the sovereignty creating it.

Various Kinds of Corporations.

Corporations are divided into corporations aggregate, corporations sole, public corporations and private corporations, the latter class being again subdivided into ecclesiastical or religious corporations, and eleemosynary or charitable corporations.

Corporations aggregate are those composed of two or more persons. Corporations sole are those composed of a single person, as, for example, a minister who holds parsonage lands to himself and his successors, in right of the parish, or the Governor of the State, or any other public officer who is invested with any of the attributes of a corporation by reason of his official position.

Public corporations are Government institutions, created by law for the administration of the public affairs of a community, such as counties and municipalities. Whether a corporation is to be regarded as a public one or not depends upon the object for

which it was created rather than the interests controlling it. The fact that all the shares in a corporation are held by the State does not render it a public corporation. Thus it has been decided that a State may hold the entire stock of a State bank, but such a bank is not, on this account, a public corporation.

Private corporations are associations formed by the voluntary agreement of the members composing it, as, for example, banking, railroad and manufacturing companies.

Religious corporations are such as are organized for the purpose of advancing the cause of religion or administering church property for religious purposes. The incorporated churches existing throughout the United States are corporations of this class.

Charitable corporations are those organized for the purpose of carrying out charitable trusts, the distinguishing feature of this class of corporation being that they are not formed for the profit of the incorporators thereof. Illustrations of this class are corporations formed for the management of free hospitals and asylums for the poor, insane, blind or incurable; also colleges and universities of learning promoted by private donations.

A further division of corporations not usually mentioned in the authorities is that of domestic and foreign corporations.

A corporation is considered as domestic to the State under the laws of which it was created.

A foreign corporation is one doing business in a State in which it was not incorporated. For example, the Pennsylvania Railroad Company is a domestic corporation of the State of Pennsylvania, whereas, it is regarded by the State of New York as a foreign corporation. A corporation is a citizen of the State granting its charter, regardless of the fact that by subsequent transfer of stock, all the shareholders may be citizens of another State or States.

A domestic corporation may transact business within the limits of the State which created it. It may, of course, transact business universally, but its powers are generally restricted by other States. To illustrate, a foreign corporation cannot lawfully transact business in Pennsylvania until it has first filed in the office of the Secretary of the Commonwealth a certificate setting forth the location of its established office in this State, the name of the agent appointed to represent it here, the proper name of the corporation, the State wherein it was incorporated and the general nature of its business.

A foreign corporation has no standing in our Courts unless it has first filed the above-mentioned certificate. The act does not, however, prohibit a foreign corporation from selling and delivering goods to a customer in Pennsylvania and suing in our Courts for their value. But a foreign corporation cannot make sales in Pennsylvania by shipping goods on consignment, or through traveling agents who do not confine themselves to taking orders, but make actual sales.

A foreign corporation cannot hold real estate in Pennsylvania, but may hold stock in a Pennsylvania corporation owning real estate in Pennsylvania. By different statutes, various kinds of foreign corporations are given the right to hold real estate in this State for specified purposes.

Formations of Corporations.

Unlike a partnership, a corporation cannot be formed simply by a contract to this effect by the individuals who are to compose the same. The right to the special privileges enjoyed by a corporation can only be granted by a sovereign power, either a State or National Legislature. Hence there are two parties to the formation of a corporation: (1) the State, and (2) the incorporators, who are the individuals composing the corporation. The creation of a corporation being the result of a contract, is governed by the general rules of offer and acceptance. The charter is regarded as an offer by the State to certain individuals (the original subscribers or incorporators) and to constitute a valid contract must be accepted.

The usual manner of accepting a charter is by a majority vote of the incorporators at a meeting expressly convened for the purpose. But it has been held that acceptance of the charter may also be inferred from the conduct of the incorporators. Thus if after a formal application for a charter and after the same has been granted, the incorporators should exercise the corporate powers conferred upon them by the charter, an acceptance of the charter will be presumed by such conduct. As a general rule any person who is competent to enter into a valid contract may become an incorporator.

The power of a State Legislature to grant corporate franchises has certain constitutional limitations, the Constitution of Pennsylvania and most other States providing that no charter of incorporation shall be granted by special act, and that corporations shall be formed only in accordance with general laws.

Corporations are divided by the law of Pennsylvania into

two classes: first, those which are not for profit, and second, those which are for profit.

Principal among those included in the first class are corporations for the support of public worship, any benevolent, charitable, educational, or missionary undertaking; literary, medical or scientific undertaking; library association, or for the promotion of music, painting or other finer arts; corporations formed for the encouragement of agriculture and horticulture; for the maintenance of a club for social enjoyments, or of a public or private cemetery, for the maintenance of a society for beneficial or protective purposes to its members from funds collected therein; corporations formed for the support of fire engine companies and for the protection of trade and commerce; and for the formation and maintenance of military organizations.

Principal among those corporations included in the second class are those for the insurance of human beings against death, sickness or personal injury; for the construction and maintenance of any specie of street, road or highway; the establishment and maintenance of telegraph lines, ferries, hotels, market houses, building and loan associations; associations for the purchase and sale of real estate, and for the carrying on of any mechanical, mining, quarrying or manufacturing business, etc. As the objects for which these two classes of corporation are formed differ materially, their formation is regulated differently.

Corporations of the first class may be formed by the voluntary association of five or more persons, and corporations of the second class by the voluntary association of three or more persons, and when so formed shall have the following powers unless otherwise provided:

1. To have succession by its corporate name for the period limited by its charter, and when not so limited, perpetually;
2. To maintain and defend judicial proceedings;
3. To make and use a common seal and alter the same at pleasure;
4. To hold, purchase and transfer such real and personal property as the purposes of the corporation require, not exceeding the amount limited by its charter or by-laws;
5. To appoint and remove such subordinate officers and agents as the business of the corporation requires, and to allow them a suitable compensation;
6. To make by-laws not inconsistent with law, for the management of its property, the regulation of its affairs and the transfer of its stock;

7. To enter into any obligation necessary to the transaction of its ordinary affairs.

The charter of a corporation for profit must be subscribed by three or more persons, one of whom must be a citizen of Pennsylvania. Said charter is required to set forth the following:

The name of the corporation, the purpose for which it is formed, the place or places where its business is to be transacted, the term for which it is to exist, the names and residences of the subscribers and the number of shares subscribed by each; the number of its directors and the names and residences of those who are chosen directors for the first year;—the amount of its capital stock, and the number and par value of the shares into which it is divided.

The law requires that notice of the intention to apply for a charter shall be published in two newspapers of general circulation printed in the proper county for three weeks, which notice must briefly set forth the character and object of the proposed corporation and the intention to make application for incorporation.

The certificate for a corporation of the second class (i. e., for profit) must further state that ten per cent. of its capital stock has been paid in cash to the treasurer, giving his name and address. Said certificate must be acknowledged and recorded in the office for the Recording of Deeds in the county in which the principal office of the corporation is to be situated.

Said certificate, together with proof of publication as required, shall be presented to the Governor of the Commonwealth, who shall examine the same, and if he approves thereof he will indorse his approval thereon and direct that letters patent issue incorporating the subscribers and their associates and successors into a body politic and corporate, in deed and in law by the name chosen.

The certificate of incorporation shall be recorded in the office of the Secretary of the Commonwealth; charters may be amended, or if the duration of the corporation is limited, its charter may be renewed upon proper application.

The law of Pennsylvania requires that the business of a corporation be managed or conducted by a board of directors, a president, secretary, treasurer and such other officers, agents and factors as it may be necessary to appoint.

The board of directors of any corporation organized under the laws of Pennsylvania shall consist of not less than three mem-

bers, or more than fifteen, and shall be elected by a vote of the stockholders at the annual meeting of the corporation.

The president is the executive head of the corporation and presides at the meetings of the board of directors, being elected either by the directors or the members of the corporation as the by-laws provide.

The secretary records the votes of the corporation and keeps the minutes of its transactions in a book to be kept for that purpose, and is sworn to perform his duties faithfully.

The treasurer of a corporation is, of course, the officer entrusted with the care of its finances, and must give a bond in such sum and with such securities as the by-laws require.

Vacancies occurring among the officers of a corporation may be filled by the directors until the next election.

The Contract of Membership.

The ordinary commercial corporation consists of several members who have agreed between themselves to organize a corporate association. The members of such a corporation are called shareholders or stockholders. The contract between them is set forth in their charter or in the articles of association agreed to in pursuance of a general incorporation law.

A person may become a member of a corporation either by a contract between the original incorporators thereof, or by substitution in the place of an existing member through a transfer of shares.

Although the contract by which the subscribers to the certificate of incorporation become members of the corporation is not effective until all the conditions required by the statute have been complied with, nevertheless the subscribers are bound by their subscriptions from the time they are made. As the statutory subscription is required merely for the purpose of bringing the corporation into existence, after the corporation has been organized, further subscriptions to stock, whereby new members are admitted into the association, is a matter to be regulated by the corporation itself. Hence a subscription for shares after a corporation has been organized does not render the subscriber a shareholder until it has been accepted by the company through its proper agents.

The subscribers to a charter for a corporation are liable to pay the full value of the shares subscribed by them. The contract of a subscriber is an executory contract and is like the liability of a partner to contribute his share of capital as provided

by the partnership articles. Where the stock subscriptions are made before incorporation, upon obtaining a charter the subscribers assume the status of shareholders. The issuing of a certificate of shares is never essential to constitute a subscriber or a transferee of shares a stockholder; it is merely evidence of his right, and may be demanded by the stockholder by virtue of his right of membership.

An important distinction arises between an agreement to purchase shares in a corporation and a subscription therefor, depending upon the intention of the parties. If payment of the price for the shares and delivery of the certificate therefor are by the agreement clearly intended to be concurrent acts the transaction will be a purchase and sale of the shares. As the purchaser does not, therefore, become a shareholder until he has received his stock certificate, a breach of his agreement to purchase before receiving the certificate would only render him liable to the extent of damages actually suffered by the corporation on account of said breach.

On the other hand, an ordinary subscription to stock contemplates that the subscriber shall become invested with all the rights and liabilities of a shareholder before the whole amount of the shares subscribed by him have been paid in. A subscriber to stock in a corporation becomes entitled to vote at the meetings and share in the dividends earned by the corporation, but is liable to contribute the amount of the shares subscribed when called upon or assessed by the Board of Directors.

Additional Subscriptions.

A subscription for shares of stock in a corporation may be made conditionally, in which event the subscriber does not become a shareholder in the company until the conditions specified have been performed. Such a subscription is in reality only an offer to become a shareholder upon fulfilment of certain conditions. The performance of the stipulated conditions is an acceptance of the offer, and the subscriber thereupon becomes a shareholder, with incident rights and liabilities. For example, it is quite usual for a man to subscribe before a certain time. Unless the amount specified was subscribed within the time limited the subscriber would not be bound by his subscription. Similarly a subscription for shares in a railroad company by the owner of a farm upon condition that a station be located at a certain corner thereof would not be binding upon the subscriber if the railroad built the station at a point two miles distant

from subscriber's farm. Some authorities, however, take a view that it is a fraud toward the other stockholders to permit one to subscribe to stock with any secret condition attached to the subscription. Others seeing the name of the subscriber upon the books of the company might themselves be induced to subscribe by virtue of the additional security thus offered. But the weight of authority is to the effect that it is unfair to force a man to subscribe to stock when, for example, the promise to build a station on his land has been broken, which was his only reason for subscribing. Such conditions as are attached to a stock subscription must not, however, be of such a nature as clearly indicates an intention to deceive the public.

A conditional subscription must not be confounded with a subscription upon special terms. These distinctions may appear to be rather hair-splitting, but they are, nevertheless, as important as they are easily understood. As we observed above, a subscriber upon condition does not become liable on his subscription until the required condition has been performed. A subscription upon special terms is, for example, one providing that the subscriber may pay his subscription at a particular time, or instead of paying the same in money, may do so by contributing machinery or other property. Such a subscription is an absolute one, but the rights and liabilities of the subscriber are governed by the special terms stipulated. Ordinarily a subscription upon special terms cannot be made before a company has received its charter, but after a corporation has been organized such a subscription is regarded as an offer which becomes binding upon acceptance by the proper officers of the corporation.

Subscriptions Obtained by Fraud.

It is a well-established rule of law, as we learned in our study of contracts, that if a person is induced to enter into a contract by false representations or fraudulent statements made by the other contracting party or his agent, the contract may be avoided, at the option of the innocent party. This principle applies with full force to contracts of membership in a corporation; and consequently, if a subscription for shares has been obtained through fraudulent representations the subscriber may repudiate his subscription and withdraw as a member of the corporation. A false statement regarding the contents of the charter would not, however, entitle a subscriber deceived thereby to avoid payment of his subscription, because a man in subscribing for shares undertakes to become a member of a particular corporation, and as his con-

tract of membership is contained in the company's charter (which is of public record) he is bound at his own peril to inform himself of its contents. Furthermore, such false statements as will give a subscriber the right to repudiate his subscription must not relate to a matter of public law, must not be an expression of opinion, but a positive statement of fact, which must have been made by an agent authorized to speak on behalf of the corporation; they must have constituted a material inducement to the subscription, and the party deceived by such false statements must act promptly in annulling his subscription, otherwise his privilege is lost.

Rescission of Contract of Membership.

Unlike a partnership, a corporation cannot release any of its members from liability by consenting to a cancellation of the shares of a subscriber. The Supreme Court of Pennsylvania has held that the Directors of a Corporation are Trustees for all the stockholders and that it is an abuse of their trust to single out some of the stock subscribers and release them from liability.

It may be laid down as a uniform rule of law that a shareholder in a corporation can escape from the obligation of his contract only by one of the following methods: (1) By a transfer of his shares and an acceptance for the transfer by the corporation; (2) by a forfeiture and sale under authority given the company by its charter; (3) by dissolution of the company; (4) by act of the majority in winding up the business of the company and the surrender of its charter; (5) by an act of the shareholders, where permission to withdraw is expressly conferred by the charter, and (6) by unanimous consent of the members of the company under legislative authority.

Many charters contain a provision that the shares of a stockholder may be declared forfeited and sold for non-payment of assessments. The assessments must be authorized by the proper agents of the corporation and if the amount due is tendered to the proper agent of the corporation at any time before a sale for non-payment has actually taken place, a sale made thereafter will be void.

Where a power has been given to declare a forfeiture of shares for non-payment of calls upon a member, the corporation may either exercise this power or sue for the unpaid calls in an action at law. If a corporation decides to rescind a stockholder's contract of membership by a forfeiture and sale of his shares therein on account of non-payments of calls made for the unpaid

portion thereof, it may do so in one of two ways: (1) The shares must either be sold as paid up only to the amount actually paid on them and subject to further calls to the full value of the shares, and the proceeds, less expenses, turned over to the former holder, or (2) the shares must be sold as full paid and after deducting from the price received the amount of calls which the former holder refused to pay, the balance is refunded to him. It should, of course, be borne in mind that if the by-laws provide a penalty for non-payment of assessments, the proceeds derived from a sale of shares could be retained by the corporation as such a penalty.

Liability of Stockholders.

Whether one is an original subscriber of stock or becomes such after a corporation has been formed, he is liable to contribute to the corporation the full amount of the shares he subscribed.

It sometimes occurs that the promoters of a corporation, having difficulty in raising sufficient capital to properly conduct business, offer to sell stock at a percentage of its face value, say thirty-three and one-third per cent. That is, a purchaser would receive \$30,000 worth of stock upon payment of \$10,000. Such a purchaser is entitled to receive dividends upon his stock the same as if he had paid the full value. Consequently it would appear upon the books of the company that the full amount had been paid, and the treasury of the company would appear to be in better shape than it actually was.

Assume, that under these circumstances a party, upon examination of the corporation's books, is induced to loan it a large sum of money. It subsequently develops that the purchaser upon the terms mentioned above has never paid in the full value of his stock. The principle of law governing such a case is as follows: Every subscriber to stock of a corporation guarantees the amount of the face value of the stock standing in his name shall be used in payment of the liabilities of the corporation. He cannot escape his liability to pay the full amount of his subscription into the treasury of the company for the benefit of its creditors by any agreement with the corporation. In other words, the contract would be valid as originally made, provided the rights of creditors did not intervene.

Transfer of Shares.

The right of a stockholder in a corporation, as represented by his certificate of stock, is personal property, and as such may be bought and sold like any other personal property. The by-laws of all corporations provide that no holder of a certificate of stock shall be recognized by the corporation or be entitled to receive dividends or vote at its elections until his name has been properly entered upon the company's books.

The means whereby a stockholder may sell his rights in a corporation is by transferring his certificates of shares to another. Such a transfer of shares in a corporation operates as a substitution of a new shareholder in the place of an outgoing shareholder and an assumption by the former of all the rights and liabilities which attached to the latter, who is discharged from all further liability to contribute capital and loses all right to share in the company's profits and to participate in the management of its affairs.

When a transfer of shares has taken place the question arises, who is liable for unpaid calls, in determining which question it is necessary to distinguish between the rights of the corporation as against the parties to the transfer, and the rights and liabilities of the transferor and transferee as between each other.

It may be stated as a general rule that as between a company and its shareholders the party transferring shares is discharged from liability to pay calls made after the execution of the transfer, and that such liability rests upon the party receiving the shares (the transferee). One cannot, however, by transferring his shares to another avoid responsibility for calls made upon his stock prior to the transfer. After a call has been made, a corporation has a cause of action against a shareholder which cannot be discharged except with the corporation's express consent.

The liability for unpaid calls so far as the transferor and transferee of the shares are concerned depends altogether upon the agreement between them.

Having learned upon whom the law places liability to pay unpaid calls upon shares of stock in a corporation, let us next inquire who, as between the transferor and transferee of shares is entitled to dividends, payable out of the profits earned before the transfer, but which are not declared until after the transfer has been executed.

It has been decided that the shareholder at the time the dividend is declared is entitled thereto, regardless of the time

said dividend was earned. It is necessary that the agents of a corporation should know to whom it is liable to pay dividends which have been declared. A corporation is protected in paying dividends to those who are the legal holders of shares on the stock books of the company at the time the dividends are declared.

After a corporation has become insolvent shares of stock therein cease to be subject of legitimate traffic. A transfer thereafter would be but a subterfuge to avoid liability, which would not be permitted. It is the duty of the corporation to call in the outstanding capital, satisfy all creditors and wind up its business as soon as possible.

Registry of Transfers.

The by-laws of practically every corporation provide that its shares shall be transferable only by entry upon the books of the company, and that a new certificate shall be issued to the transferee upon a surrender of the outstanding certificate. This is for the purpose of providing the corporation and those dealing with it means of ascertaining who are its shareholders. Otherwise it would be impossible to know who are entitled to vote at the meetings, to whom dividends should be paid and who are liable as shareholders to the company as debtors on account of unpaid calls.

Shares of stock in a corporation are by general mercantile usage assignable by indorsement and delivery of the certificate issued to the owner as evidence of his rights. A power of attorney to execute a transfer upon the stock books of the corporation is contained upon the back of the certificate. If the assignment and power of attorney are executed in blank, the certificate may pass from one person to another and the last holder will have the right to fill up the assignment and power of attorney and complete the transfer by entry upon the books of the corporation.

A corporation is compelled to enter a valid transfer of the shares upon its books. If the officers of a corporation refuse to do so, the transferee may enforce his rights by a bill in equity. In a well-known case a certain party, by writing a pamphlet attacking the methods of the Standard Oil Company, made himself very obnoxious to that corporation. He subsequently purchased some of its stock and its officers refused to enter his name upon the stock books as the legal owner thereof. By application to a Court of Equity he forced them to do so. Although a stock certificate is in neither form nor character a negotiable

instrument, it approximates it as nearly as practicable. The purchaser is assured under the seal of the corporation that the stockholder is entitled to so much stock, which can be transferred on the books of the corporation in person or by attorney, when the certificate outstanding is surrendered. This is a guarantee that whoever in good faith buys the stock and produces to the corporation the certificate, regularly assigned, is entitled to have the stock transferred to him.

Rights and Remedies of Stockholders.

In considering the rights and remedies of the individual members or shareholders in a corporation it is of the utmost importance to bear clearly in mind that, while a corporation is regarded in law as an artificial person or entity viewed as a collective body, it is in reality an association of individuals, and no law can alter this fact. Hence there is a distinction between those rights which belong to the shareholders individually and those belonging to them collectively or in their corporate capacity. An illustration will perhaps make this distinction clear. After a dividend has been declared by the proper agents of the corporation each shareholder has the right to sue the corporation to recover the amount payable on his shares, this being an individual right. If, however, the agents of a corporation should wrongfully refuse to declare a dividend when it is their duty to distribute the profits earned, this would affect the collective rights of all the stockholders, but no one could sue for any particular portion of the undivided profits. The right to have a dividend declared must be enforced by action in the corporation, rather than against it, being a collective rather than an individual right.

Moreover, in every corporation the entire management of the corporate affairs is entrusted to certain individuals, the agents authorized to act for the company and who are given the power of protecting the company from injuries and enforcing its collective rights. Hence wrongs which affect the entire body of shareholders affects the corporation, and redress must be had through its proper agent, otherwise great inconvenience and unnecessary expense would result if any individual shareholder could bring suit for every injury to the corporate rights. Therefore, to maintain a suit to enforce the rights of an individual stockholder, it must first be proven that the proper agent or agents of the corporation have refused to act and that all remedies within the corporation have been first exhausted.

If the agents of a corporation are themselves guilty of a

wrong, a shareholder may maintain a suit in Court without proving that he first requested the guilty agents to proceed in the name of the corporation against themselves, which would be an absurdity.

It may be laid down as a settled rule that no shareholder can interfere with the management or dictate the policy a corporation shall follow so long as the duly appointed agents are acting honestly within the discretionary power conferred upon them by the charter or by-laws. If a shareholder is dissatisfied with the management of a corporation his remedy is to elect other agents in the manner and at the time provided by the charter.

If under proper circumstances a shareholder brings suit to protect his interest in a corporation the relief granted will enure to the benefit of the corporation and all other shareholders similarly interested, who are regarded as parties thereto and may properly be joined as complainants, although it is not necessary to do so.

Neither the agents of a corporation nor a majority of its stockholders have any right to direct its affairs except in accordance with the provisions of its charter, and any action to the contrary will give any aggrieved stockholder a right to bring suit to restrain the act or recover damages sustained thereby.

Every stockholder has, as incidental to his ownership of stock in a corporation, the right to vote for the election of its officers or agents and for the principles embodied in its constitution and by-laws, and may sometimes vote to decide the general policy upon which the business of the corporation is to be conducted, if such right is given by the by-laws. Any stockholder may delegate this right to vote at a particular meeting, and the party receiving this right is called a proxy. The power of a proxy to vote may be withdrawn at any time.

Right to Receive Dividends.

The object for which every ordinary business corporation is formed is the pecuniary profit of its shareholders or members. Consequently any net increase of the capital of a corporation is distributable as profits to each shareholder in proportion to the number of shares held by him.

Dividends can only be paid out of the profits of the net increase of capital, and cannot be drawn upon the capital contributed by the shareholders for the purpose of carrying on the company's business. The surplus acquired by a corporation over and above its capital and debts incurred for running expenses

becomes profits, and may be divided among the shareholders or used to expand the company's business as its authorized agents, in the exercise of a proper discretion, may direct. The directors of a corporation are not required to divide the entire profits earned, but may reserve sufficient to meet future or contingent claims and to enlarge the corporate business.

Many corporations create two classes of stock, common and preferred. The holder of preferred stock is entitled to receive a dividend up to a certain percentage, as indicated in his certificate of stock, before the holder of common stock has any right to claim a dividend. The right to issue preferred stock must be specially granted.

A dividend properly declared by the directors of a corporation cannot be revoked subsequently. All shareholders on the books of the corporation at the time a dividend is declared have a legal claim against the company for the payment of the amount of dividend due them.

Right to Preëmption.

If a corporation decides to increase its capital by issuing an additional amount of new stock, the stockholders must first be given the right to purchase an amount proportionate to the number of shares held by them in the company at the time the new stock is issued before the same can be placed upon the market. This right is given to the stockholder in order that he may preserve his voice in the management of the company's affairs. If the stockholder refuses to accept and pay for his part of a new issue of shares within the time limited by the Board of Directors, his right of preëmption becomes forfeited.

Right to Examine the Company's Books.

It is apparent that if every shareholder of a large corporation was given the right to examine its books at pleasure it would be impossible to keep them in a proper manner. Consequently the law in some States holds that the books of a corporation may only be examined at a meeting duly convened by agents appointed by a majority of the shareholders. The Supreme Court of Pennsylvania has decided differently, to wit: "Unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers, for a definite and proper purpose, at reasonable times."

The Management of Corporations.

A corporation may do any acts necessary to prosecute its legitimate business in the same manner as an individual or co-partnership engaged in a similar line of business. Thus it has the right to purchase and sell property, to enter into contracts, to bring and defend suits at law or in equity.

The management of the affairs of a corporation is, as we have seen, delegated by a majority of the shareholders to particular agents, usually a board of directors, president, secretary and treasurer, etc. A majority of a corporation is a majority of those stockholders present at a regularly called meeting, providing a quorum of the whole be present; and need not necessarily be a majority of all the shareholders of the company.

In the election of officers to manage the corporation, or in meetings at which other matters are to be voted on by the shareholders, the custom has become well established to give each stockholder one vote for each share of stock which he holds, otherwise one holding a hundred shares of stock would have no more authority than a man holding ten shares, which is contrary to principles of justice. In Pennsylvania cumulative voting is legal. It is necessary that all the shareholders be duly notified of a meeting before it is held, in the absence of which notice no proper action can be taken. The majority has the right at a regularly appointed meeting to make reasonable rules or regulations or by-laws for governing the corporation, this power of making by-laws being given in the charter of every business corporation, but such by-laws as are enacted must not be contrary to the charter or the general laws of the land.

Every shareholder is bound by the by-laws adopted by the majority on behalf of the corporation under authority of the charter. Consequently no agent of the corporation can bind it by any act in violation of the company's by-laws. The principles of the law of agency are equally as applicable to corporations as to individuals. The directors of a corporation, who are agents appointed to regulate its management, should be men of practical business experience and judgment. Ordinarily they are required to be shareholders in the company and are not entitled to compensation for their official services as directors. But if a director is engaged to render services outside of his duties as director, he is entitled to reasonable compensation for his services.

The Board of Directors has no authority to wind up the business of the corporation or sell any property necessary to carry it on. The directors are merely agents of the company whose gen-

eral powers are regulated by its charter and by-laws. The value of the business as a commercial speculation and the advisability of carrying it on are matters which concern the shareholders who have embarked in the business and not their managing agents. The Board of Directors of a corporation occupy a fiduciary or trust relation thereto. Consequently the directors cannot bind the corporation by any contract made with themselves personally or by any transaction with third parties in which they have a private interest. The theory of the law is that a director should not be allowed to obtain any advantage to himself through his control over the company. Hence they cannot lawfully by any arrangement secure to themselves a share in the profits of any transaction to which the corporation is a party.

The rule which disqualifies an agent from representing his principal in any transaction in which his personal interests are opposed to those of his principal restricts the directors of a corporation from dealing with another corporation in which they are shareholders, if their interest in the latter company might induce them to favor it at the expense of the corporation whose interests have been intrusted to their care as directors.

Ordinarily the directors of a corporation cannot act singly but only as a board at a meeting regularly called at which a quorum is present and in which a majority vote on all questions is necessary to control or bind the corporation.

Corporations, we have seen, are liable on all contracts entered into by their authorized agents if within the scope of their authority. Similarly a corporation is bound by the torts of its agents provided they are done in the course of employment and further in discharge of a duty owed the employer. The only exception to the rule that a corporation is liable for the torts of its agents is presented in the case of charitable corporations. A hospital, for example, would not be responsible for the wrongful acts of its servants, this rule being based upon principles of public policy. Thus a corporation is liable for a trespass upon the lands of another or for an assault committed or nuisance maintained by any officer or agent of the corporation in the discharge of his usual employment.

A corporation is also liable for the negligence of any of its agents. A corporation is also liable for failure to provide its employees with a safe place within which to work and safe tools with which to work as well as proper instructions regarding work of a dangerous character.

It is obvious that a corporation cannot commit a crime.

However, it is responsible for the criminal acts of its agents to the same extent that an individual is bound by the criminal acts of his agent. Thus quite recently the Standard Oil Company was held criminally liable for the acts of its agents in accepting rebates from the Chicago and Alton Railroad Company contrary to the terms of the Elkins Act.

Ultra Vires Acts.

In view of the fact that the State exercises more or less control over all corporations chartered by it, if a corporation assumes powers not specifically granted to it, the State, through its Attorney General, may take action to forfeit its charter on the ground that such acts are *ultra vires* and void.

At the beginning of this subject it was pointed out that the creation of a corporation is in the nature of a contract between the State and the incorporators. Unless the right to revoke a charter is expressly reserved by the State in granting it, the State would have no right of revocation, the Constitution of the United States providing that the obligation of a contract shall not be impaired. Where the right is reserved, a revocation of the charter of a private corporation is not a violation of the constitutional provision above set forth. A corporation may, therefore, be dissolved by a forfeiture or revocation of its charter, the causes justifying a forfeiture being either a misuse or nonuse of its franchise or a substantial departure from the purposes for which it was created.

Corporations may further be dissolved by expiration of time, i. e., when the time is limited in the charter during which a corporation shall exist, the corporation ceases to exist upon the expiration of the specified time. A corporation may also be dissolved by a voluntary surrender of its charter and acceptance of said surrender by the State.

The dissolution of a corporation has no more effect upon its debts and liabilities than the death of a private person has upon obligations contracted by him. When a corporation has been dissolved by any legal method, the creditors or stockholders may ask for the appointment of a receiver, who shall take charge of all the real and personal property owned by the late corporation and hold it as a trust fund for the payment of all debts contracted by it. If any surplus remains after all legal claims have been paid, it will be divided among the stockholders in proportion to the number of shares held by them.

In conclusion, the superior advantages of a corporation over every form of business association cannot be emphasized too strongly. In the first place, a corporation, unlike a partnership, may enjoy perpetual existence, whereas a partnership becomes dissolved by the death or retirement of any member. In the second place, individuals who invest their capital in a corporation risk nothing beyond the actual amount which they pay into the coffers of the corporation, and if, perchance, the business of the corporation becomes a disastrous failure, a stockholder only loses what he has paid in and no creditors can come upon his property for the payment of their claims. It is for this reason particularly that the enterprises, large and small, who prefer to incorporate rather than risk the fortunes of their membership, are multiplying every year. In the third place, a business can be conducted much more conveniently and expeditiously in the form of a corporation than otherwise, in view of the fact that the powers of the agents authorized to transact its business are definitely prescribed by the charter and by-laws of the corporation.

The cost of incorporating varies in the different States, but considering the innumerable advantages appertaining to a corporation, a charter may be procured for a very nominal amount.

PROMISSORY NOTE

§ Philadelphia, 191
after date promise to pay to
the order of Dollars
at
Without defalcation, for value received.
No. Due

COLLATERAL NOTE

§ 19
Promise to pay to the order of
Dollars,
without defalcation, for value received and have
deposited herewith

as collateral security for the prompt payment at maturity, of this and any other liabilities of the undersigned, due or to become due, or that may be hereafter contracted with the holder of this note; which collaterals, either the whole or any part thereof hereby authorize and empower the holder of this Note should the same or any other liability of the undersigned as above described, be not paid at maturity, to sell at public or private sale at any time or times thereafter, without further notice and with the right of becoming the purchaser at such sale or sales, of the whole or any part of said collaterals, freed and discharged of any equity of redemption, and to transfer, assign and deliver the same; and after deducting all legal and other costs, attorney fees and expenses of collection, sale and delivery, to apply the residue of the proceeds of such sale or sales, to pay any, either or all of said liabilities as said holder shall deem proper, returning the overplus if any, to and should any deficiency occur further promise and agree to pay the holder hereof on demand.

Payable at

Due

JUDGMENT NOTE

\$

19

after date, for value received,

promise to

Pay

or

Assigns,

Dollars,

with interest, and without defalcation or stay of execution. And do hereby authorize any Attorney to appear for and confess judgment for the above sum, with interest and costs of suit, a release of all errors, and waiver of all rights to inquisition and appeal, and to the benefit of all laws exempting real or personal property from levy and sale.

Witness,

L.S.

L.S.

BILL OF EXCHANGE

Exchange for

19

of this first

*of Exchange (Second of same tenor and date unpaid)
Pay to the Order of*

for Value received and place the same to account of

To

}

No.

NEGOTIABLE INSTRUMENTS.

Characteristics—Essential Elements—Various Kinds Defined—Indorsements—Rights of the Holder—Liabilities of the Parties Thereto—Defenses—Conflict of Laws.

IT was pointed out in our discussion of the subject of contracts that negotiable instruments formed certain exceptions to the law applicable to contracts in general. We will now enter upon a more careful inquiry into the law governing this particular class of contracts, which was derived from a branch of the law usually referred to as the "Custom of Merchants."

When international commerce developed and expanded, it became imperative that laws should be formed, common to all countries, governing transactions between merchants residing in various sections of the world; otherwise disputes would continually arise between a merchant of one country trading with a merchant of another as to what law should govern the transaction between them. To promote commerce by overcoming these difficulties the rules comprised in the "Custom of Merchants" were evolved, among the most important of which are the laws governing the purchase and sale of negotiable paper. The laws affecting merchant and merchant in every country in the world, having been founded on the system of rules known as the "Custom of Merchants," are practically uniform. Consequently business men in dealing with each other in different parts of the world transfer values almost exclusively through the medium of bills of exchange and promissory notes.

There are various kinds of negotiable instruments, the most common of which are promissory notes and bills of exchange, which we will first consider. But at the outset let us clearly understand what is a negotiable instrument.

"A negotiable instrument is that medium for the exchange of values made by an individual on the strength of his ability to meet the obligation thus created, and accepted by others on their confidence in the financial credit of such maker, and which is as good in the hands of third persons as in the hands of the original parties."

A negotiable instrument is in reality but the transfer of that mutual confidence between man and man upon which the greater volume of business in the commercial world must of necessity be

based, and its transfer from hand to hand may be accomplished with the same legal effect as the transfer of money.

Characteristics of a Negotiable Instrument.

A negotiable instrument is in form and substance a contract in writing and possesses four characteristics—

1. It may be transferred by the original holder or owner and the transferee in his own name can sue the maker or subsequent promissor for the non-fulfillment of his promise.

2. If a negotiable instrument is stolen and transferred by the thief to another for a valuable consideration in the usual course of business before maturity, a perfect title would be acquired by the purchaser, which would not be the case if a horse or any other species of property were stolen and resold.

3. The holder of a negotiable instrument is entitled to its full face value, and such defense as the maker of the instrument may have against the payee would not be recognized against a subsequent holder who acquired the instrument in the usual course of business and before maturity.

4. A negotiable instrument imports a consideration the same as a sealed instrument. This quality was first possessed by bills of exchange, but later was extended by statute to include promissory notes. The fact that no consideration was given for the instrument may be proved by the immediate parties, but not against subsequent parties.

Essential Elements of a Negotiable Instrument.

Under the law governing negotiable instruments in Pennsylvania, which has been reduced to a code, as in twenty-three other States in the Union, a negotiable instrument to be valid must conform to the following requirements:

1. It must be in writing, and signed by the maker or drawer.

2. It must contain an unconditional promise or order to pay a certain sum in money.

3. It must be payable on demand or at a fixed or determinable future time.

4. It must be payable to order or to bearer.

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated with reasonable certainty.

6. The parties to a negotiable instrument must be competent to enter into a contract.

7. A negotiable instrument must be founded on a valid consideration.

8. Actual delivery must be made to give effect to the instrument.

Kinds of Negotiable Instruments.

The words most frequently employed to indicate the negotiability of an instrument are the words "to order," "or bearer," but any words from which it can be inferred that the maker intended the instrument to be negotiable will have that effect. Consequently there are several kinds of negotiable instruments, the best known in the commercial world being promissory notes, bills of exchange and bank checks. Warehouse receipts, bills of lading, coupon bonds and clearing house due bills are less common forms of negotiable paper which we will consider later.

Definition of a Promissory Note.

A promissory note is an unconditional promise in writing to pay a certain sum of money to the order of some other person or persons at a definite time. The following is a usual form of promissory note:

\$5,000.00.

Philadelphia, August 1, 1911.

Sixty days after date I promise to pay to the order of John Doe Five Thousand Dollars, at the West End Trust Company of Philadelphia, for value received, with interest.

RICHARD ROE.

Richard Roe, the party promising to pay the money, is called the "maker" of the note; John Doe, the party to whom the money is to be paid, is called the "payee."

If the above note was made payable to John Doe or bearer, it could be transferred by delivery, but being made payable "to order," it can only be transferred by indorsement, which is done by writing the payee's name across the back of the note. The party who indorses the note is called the "indorser" and the party who receives the same is called the "indorsee."

Definition of a Bill of Exchange.

The Negotiable Instrument Act of Pennsylvania defines a bill of exchange as follows: "A bill of exchange is an unconditional order in writing, addressed by one person to another; signed by the person giving it, requiring the person to whom it

is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer."

A usual form of a bill of exchange is as follows:

\$5,000.00.

Philadelphia, August 1, 1911.

At sight pay to John Doe or order Five Thousand Dollars for value received, and place the same to the account of

RICHARD ROE.

To J. J. Jones & Co.,
Boston, Mass.

In every bill of exchange there are three original parties. The party giving the bill is called the drawer (Richard Roe), the party to be paid the money is called the payee (John Doe), and the party on whom the order is given is called the drawee, who upon accepting the bill is called the acceptor (J. J. Jones & Co.).

Bills of exchange are of two kinds, foreign and inland. A foreign bill of exchange is one that is drawn in one country and payable in another; an inland bill of exchange is one that is drawn and payable in the same country. The several States of the United States are regarded as foreign to one another in drawing bills. Thus if the drawer and drawee are citizens of Pennsylvania, and the bill is payable in New York, it is a foreign bill of exchange. If, however, the drawer and payee live in Pennsylvania, and the drawee in New York, it is an inland bill. Care should be exercised in disclosing the States in which the parties live, as the Courts cannot infer their residence from the place mentioned on the instrument.

A check is in reality an inland bill of exchange, and has been judicially defined as follows:

"A check is a written order or request addressed to a third person having funds in hand, requesting him to pay on presentment to a person named, or to bearer, a given sum of money."

In our definition of a promissory note we observed that it must contain an unconditional promise to pay. Now, a promise to pay is unconditional within the meaning of the law although coupled with an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount, or a statement of the transaction giving rise to the instrument. But an order or promise to pay out of a particular fund is conditional. It must be further borne in mind that the words constituting a promise to pay must be distinguished from a request or a mere recognition of an existing debt. For example, a document containing the words "I. O. U. \$50," would

not constitute a promise, being only an admittance of a debt. If the paper had read "I. O. U. \$50 to be paid on demand," these words would have constituted a definite promise, and the paper would be a promissory note.

An instrument reading: "I promise to pay to John Doe or order Five Hundred Dollars out of the income of my farm, Richard Roe," would not be a promissory note, and could not properly be negotiated, because the promise is conditional upon an income arising out of Richard Roe's farm, and, as we pointed out above, a promissory note must contain an unconditional promise.

The promise contained in a promissory note must be single. In an ordinary contract a man may bind himself to the performance of several promises, but such an instrument is not negotiable. An instrument in which Richard Roe promises to pay John Doe one hundred dollars, and also to deliver to John Doe certain chattels in his possession, was decided not to be a promissory note, for the reason that it contained a promise not only to pay a sum of money, but also to do something else—to wit, deliver certain chattels, which latter promise destroyed the negotiability of the paper.

Another element necessary to constitute a valid promissory note is that the promise must be for the payment of money, by which is meant the medium of exchange which is legal tender at the place where the note is to be paid.

Furthermore, there must be no uncertainty as to the obligation of the maker. In other words, the money promised to be paid must be a sum certain, a definite amount. This is to enable any holder of the note to determine its value immediately. The time when the money is payable must also be set forth definitely. An instrument is payable at a determinable future time, within the meaning of the law, although expressed to be payable (1) at a fixed period after date or sight, or (2) on or before a fixed determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event, which is certain to happen though the time of happening be uncertain.

Consideration.

The presence of a consideration is essential to the validity of every contract set forth in a bill or note. There is a *prima facie* presumption that every negotiable instrument has been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value.

The absence of consideration may be set up as a defense to the payment of a note as between the original parties, but not against a subsequent holder for value in due course. The absence of consideration to an indorser of a note does not affect its negotiability or validity.

We referred above to the fact that a negotiable instrument must be payable on demand or at a fixed or determinable future time. Such an instrument is payable on demand (1) where it is expressed to be payable on demand, or at sight, or on presentation; or (2) in which no time for payment is expressed. The sum payable is a sum certain within the meaning of the law, although it is made payable with interest, by stated installments with a provision that upon default in payment of any installment or of interest, the whole shall become due, or with exchange, whether at a fixed rate or at the current rate, or with costs of collection or an attorney's fee, in case payment shall not be made at maturity.

Although an instrument which contains an order or promise to do any act in addition to the payment of money, is not negotiable, the negotiable character of an instrument is not affected by a provision which—

(1) Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

(2) Authorizes a confession of judgment if the instrument be not paid at maturity; or

(3) Waives the benefit of any law intended for the advantage or protection of the obligor; or

(4) Gives the holder an election to require something to be done in lieu of payment of money.

It is not necessary that a bill of exchange or promissory note be dated to render it negotiable. It may be issued undated, antedated or post-dated. If the instrument is undated any holder may fill in the true date of issue or acceptance, but, although a holder may fill up a blank date, he cannot alter the date on an instrument without subjecting himself to the liability of criminal prosecution for forgery, as the date is a material part of a bill or note.

A negotiable instrument is payable to order when it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or

more of several payees; or (6) the holder of an office for the time being.

Regardless of whose order the instrument is made payable to, the payee must be named or otherwise indicated therein with reasonable certainty.

A negotiable instrument payable to Adam Smith or order can only be transferred by Adam Smith writing his name on the back of the paper, Adam Smith thus becoming responsible as indorser for the payment of the amount ordered to be paid the holder. If a note payable "to order" be indorsed "to bearer" it could thereafter be transferred by simple delivery.

A negotiable instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or bearer; or (3) when it is payable to the order of a fictitious or non-existing person, and such fact was known to the party making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the last indorsement is an indorsement in blank. When an instrument is payable to bearer it is transferable by delivery.

The sixteenth section of the act regulating negotiable instruments in Pennsylvania provides that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto, delivery meaning the transfer of possession from one person to another, a negotiable instrument taking effect from the time of delivery, rather than the date it bears. Delivery, to be effectual, must be made by or with the authority of the maker, drawer, acceptor or indorser, as the case may be.

A negotiable instrument made and delivered on the Sabbath is void. If, however, the bill or note is merely dated on Sunday, but is not delivered until some other day, it is valid.

Competency of Parties.

A negotiable instrument being the result of a contract, the parties thereto must have legal capacity to enforce and execute their promises or undertakings, otherwise the instrument is invalid. Thus a minor, being unable to enter into a legal contract, cannot make or indorse a bill of exchange or promissory note. Inasmuch, however, as a minor is bound to pay for his necessities, a bill or note given by a minor in payment of necessities is valid.

The Supreme Court of Pennsylvania in applying the various

statutes affecting married women, has held that a married woman has the right to contract and give a note for necessities, land, household furniture, horses, or for the improvement of her real estate, or for instruments used by her husband upon her farm, or to pay his debts. A married woman may also assign her personal property or mortgage her real estate as security for her husband's debts, or give a note in payment of an insurance policy taken out on his life for her benefit, or in payment of any debt contracted by her husband for her benefit.

A married woman cannot become an accommodation indorser, guarantor or surety for another. An ante-nuptial contract made by a married woman is not within the above prohibition and may be revived after marriage.

A bill or note given by a lunatic or habitual drunkard, so declared by inquisition, is void, and an inquiry can be made into the consideration of negotiable paper made by a lunatic, even when purchased by a third party in good faith. The defense of drunkenness, however, cannot be set up against the holder of a note for value who has taken it in good faith, although the defense would be good as between the original parties.

The distinction between a promissory note and a bill of exchange resides in the fact that the former is an individual promise to pay a certain sum of money, whereas the latter is an order to some third person to pay another a sum of money.

The language of a bill or note is sometimes ambiguous, in which event the following rules of construction are applicable:

1. If there is a discrepancy between the amount payable as expressed in words and figures, the amount indicated by the words is the amount payable.
2. If payment of interest is provided for, but the date from which interest is to run is not specified, it runs from the date of the instrument, and if undated from the issue of the instrument, any instrument undated being regarded as dated from the time it issued.
3. In case there is any disparity between the written and printed terms of an instrument the written provisions will prevail.
4. Where the instrument is so ambiguous as to give rise to doubt as to whether or not it is a bill or note, it is optional with the holder to treat it as either.
5. If a signature is so placed upon an instrument that it is doubtful in what capacity a party intended signing, he is to be regarded as an indorser.

6. If an instrument signed by two or more persons contains the words "I promise to pay" the holder can sue either signer alone or all jointly, they being jointly and severally liable.

Bearing in mind that negotiable paper circulates from one to another with practically the same freedom as money, let us inquire into the manner in which bills and notes may pass from one to another. Now, money changes ownership by mere delivery, which means a transfer of possession, either actual or constructive, from one person to another. Something further is required, however, to transfer properly possession of a bill of exchange, as a consideration of the following will indicate:

Williamsport, Pa., Aug. 15, 1911.

\$500.00.

At sixty days' sight, pay to the order of Richard Roe Five Hundred Dollars.

For value received.

JOHN DOE.

To John Smith & Co.,
Philadelphia, Pa.

Richard Roe is the party entitled to receive the money as appears from the face of the instrument, but suppose Richard Roe desires to pay a debt of \$500 to Owen Jenkins; he cannot do so by merely delivering the bill to him, because if Owen Jenkins presented the same to John Smith & Co. he could not get the money for the reason that John Smith & Co. are not ordered to pay \$500 to Owen Jenkins, but to Richard Roe. This difficulty is overcome by Richard Roe writing on the back of the bill, "Pay the within to Owen Jenkins or order" and signing his name. If Richard Roe merely signs his name on the back of the instrument he is said to indorse the same in blank, in which event the bill becomes payable to bearer. By signing his name on the back of the instrument Richard Roe becomes an indorser thereof. Owen Jenkins is known as the indorsee, and if he desires to transfer the bill to another he may do so by indorsing the same himself, and thus the instrument may pass from hand to hand indefinitely.

An Accommodation Indorser.

A party who places his name on the back of a negotiable instrument who has not received value for so doing, but who does so to give credit to the maker, is known as an accommodation indorser. Let us assume that a promissory note is executed as follows:

Three months after date, I promise to pay to the order of Richard Roe One Hundred Dollars.

JOHN DOE.

Richard Roe desires to raise funds by negotiating the note and offers it to Owen Jenkins, who, distrusting the credit of both Richard Roe and John Doe, refuses to buy it unless a financially responsible party will place his name on the back of the note. John Smith, for the purpose of giving credit to the note, indorses the same. John Smith in this case is an accommodation indorser, regarding whom the twenty-ninth section of the Negotiable Instrument Act of Pennsylvania provides as follows:

An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

The indorsement of a promissory note or bill of exchange, whether it be regular or anomalous, must be written on the instrument itself or upon paper attached thereto. Such an indorsement must be of the whole instrument; an indorsement purporting to transfer to the indorsee a part only of the amount payable, or to transfer the instrument to two or more indorsees severally, does not constitute a proper negotiation of the instrument. However, if the instrument has been paid in part, it may be indorsed as to the residue. An indorsement may be either special or in blank, and it may also be either restrictive or qualified or conditional.

A special indorsement specifies the person to whom or to whose order the instrument is payable and in order to further negotiate the instrument it is necessary that such indorsee place his indorsement thereon. An indorsement in blank, as previously noted, specifies no indorsee, being payable to bearer and is negotiated by delivery. A blank indorsement may be converted by the holder into a special indorsement by writing above the signature of an indorser any contract consistent with the character of the indorsement.

An indorsement is restrictive which prohibits the further negotiation of the instrument or which constitutes the indorsee the agent of the indorser, or which vests the title in the indorsee in trust for some other person. Such a restrictive indorsement confers the right upon the indorsee to receive payment of the in-

strument, to bring any action that the indorser could bring thereon, and to transfer his rights as such indorsee where the form of the indorsement authorizes him to do so. However, all subsequent indorsees acquire only the title which the first indorsee had under the restrictive indorsement.

A qualified indorsement is one in which the indorser is but an assignor of the title of the instrument, and is made by adding to the indorser's signature the words "without recourse," or any similar words. Such an indorsement does not alter the negotiable character of the instrument, but operates as a protection to the indorser.

Where an instrument is payable to the order of two or more payees or indorsees, who are not partners, they must all indorse unless the one indorsing has authority to indorse for the others. It is well settled that the signature of any party to a negotiable instrument may be made by a duly authorized agent, and no particular form of appointment is necessary for this purpose, as the authority of an agent may be established as in other cases of agency.

The law provides that where an instrument is drawn or indorsed to a person as "cashier," or other fiscal officer of a bank or corporation of any kind, it is deemed to be payable to the bank or corporation of which he is such officer. Such an instrument may be negotiated by either the indorsement of the bank or corporation or by the indorsement of the officer.

If the name of the payee or indorsee of a bill or note is misspelled, the same should be indorsed in the name appearing on the instrument, with the addition of the proper signature.

A negotiable instrument continues to be negotiable until it is indorsed restrictively or is discharged by payment.

Time of Transfer.

It is important to determine the time when a bill or note was transferred, inasmuch as the rights of the purchaser or indorsee depend upon whether the instrument was transferred before or after maturity.

An innocent holder for value of a bill or note may enforce payment on it regardless of the equities existing between the original parties. For example, the finder of a lost bill or note may sell the same to a third party, and if such party was ignorant of the fact that he was buying a lost instrument, he could recover the full amount thereof. A purchaser for value of a stolen bill or note may likewise recover its amount, provided, of course,

that he was ignorant of the fact. That a lost or stolen negotiable instrument may be transferred by one having no title, so as to confer rights upon an innocent holder for value, is directly opposed to the settled principles of law that no property can be transferred by one not having title thereto, but an exception is made in the case of negotiable instruments on account of their peculiar nature and function.

The purchaser of a bill or note after maturity takes the same at his peril, for, although such an instrument is still negotiable, it is subject to the same defenses as if it were non-negotiable. Any one purchasing a negotiable instrument after maturity must necessarily know that some good reason existed for its non-payment, and if a man is not prudent enough to ascertain why the bill or note was not paid before maturity, he should and must suffer the consequences.

Rights of the Holder in General.

The holder of a negotiable instrument may recover the amount payable thereon in his own name, and payment to him in due course discharges the instrument. In any discussion of negotiable instrument, the phrase "a holder in due course" is frequently employed. Let us inquire, therefore, who is a holder in due course.

A holder in due course is one who obtains possession of an instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored;
3. That he took it in good faith and for value; and
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

It will also be noted that where an instrument payable on demand is negotiated an unreasonable length of time after its issue the holder is not deemed a holder in due course.

The title of a negotiable instrument is defective within the meaning of the law if the person who negotiates it obtained the instrument or any signature thereto by fraud, duress or force, or other unlawful means, or for any illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud.

A holder in due course of a negotiable instrument holds the same free from any defect of title in prior parties and free from

such defenses as are available, to prior parties among themselves. Such a holder in due course may enforce payment of the instrument for the full amount thereof against any and all parties liable thereon.

The law further specifies that a negotiable instrument in the hands of any holder other than one not in due course is subject to the same defenses as a non-negotiable instrument. The law presumes that every holder of a negotiable instrument is a holder in due course.

Presentment for Payment.

It is not necessary to make presentment for payment in order to charge the person primarily liable on the instrument; however, if an instrument by its terms is payable at a particular place, and he is able and willing to pay it there at maturity, such would be equivalent to a tender of payment on his part. But with the exceptions to be hereinafter mentioned, presentment for payment is necessary in order to charge the drawers and indorsers, and must be made and proved by the original parties before any liability attaches to the subsequent parties or those who are conditionally liable.

In case the instrument is not payable on demand, presentment must be made on the day the instrument falls due. If the instrument is payable on demand, it must be presented within a reasonable time after it was issued, but in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation of the instrument.

In order to meet the requirements of the law, presentment for payment must be made:

1. By the holder or some one authorized to receive payment for the holder;
2. At a reasonable hour on a business day;
3. At a proper place, which requirement is complied with when the instrument is presented at the place of payment specified therein, or where no place is mentioned, but the address is given in the instrument of the party to make payment, and it is there presented; or if no address is given and no place of payment specified, and the instrument is presented at the usual place of business or residence of the person to make payment; in any other case it is presented to the person to make payment wherever he can be found, or is presented at his last known place of business or residence;

4. To the person primarily liable on the instrument or in the event of such person being absent or inaccessible presentment will be sufficient if made to any person found at the place where the instrument is made.

On the subject of negotiable instruments, it is necessary to show the instrument to the person from whom payment is demanded and if paid by him the instrument must be delivered up.

Any clerk or employee of the holder, executor or administrator in case of the death of the holder, or an assignee, if the holder be a bankrupt, may act as the agent in making presentment on behalf of the holder.

If a negotiable instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds in bank to meet payment during banking hours, in which event presentment is sufficient if made at any hour before the bank is closed on that day.

It is not necessary to make presentment for payment in order to charge the drawer or maker of a bill of exchange where he has no right to expect or require that the drawer or acceptor will pay the instrument, or in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no right to expect that it will be paid if presented.

By the provisions of the law in Pennsylvania, delay in making presentment for payment is excused if resulting from circumstances beyond the control of the holder and which delay is not due to his default, misconduct or negligence.

It is not necessary to make presentment for payment (1) when after exercising proper diligence, presentment as required by the act cannot be made; (2) in cases where the drawee is a fictitious person; (3) where there has been a waiver of presentment, either expressed or implied.

A negotiable instrument is dishonored for non-payment, when it has been properly presented for payment and payment is refused, or when presentment is excused and the instrument is overdue and unpaid.

Every negotiable instrument is payable at the time specified therein, and if the day of maturity falls on Sunday or any legal holiday, the same is payable on the next succeeding business day. The eighty-fifth section of the Pennsylvania Negotiable Instrument Act also provides that instruments falling due on Saturday are to be presented for payment on the next succeeding business

day, except if an instrument is payable on demand, the holder may, at his option, present the same for payment at any time before twelve o'clock noon on Saturday when that entire day is not a holiday.

Liabilities of the Parties to a Negotiable Note.

We will next consider the liabilities of the parties to a negotiable instrument. The maker of a note assumes an absolute responsibility to pay the amount set forth on its face to the payee or any subsequent holder, when the note is due or at any subsequent time.

The maker of a note is not compelled to pay the same until the holder thereof has presented it for payment and tendered its surrender.

If the holder of a note is unfortunate enough to lose or destroy it he may apply to a Court of Equity, who would compel payment, but would require the holder to give the maker an indemnity bond, in which he insures the maker against any loss on account of having to pay the note a second time.

The drawer of a bill of exchange engages that on due presentment the instrument will be accepted or paid, or both, and if it be dishonored and the necessary proceedings taken on dishonor, he, the drawer, will pay the amount of the bill to the holder or to any subsequent indorser who may be compelled to pay the same.

Liabilities of the Acceptor of a Bill of Exchange.

When a bill of exchange is presented to the drawee, he may accept thereof, which he does by writing on the face of the instrument the word "Accepted," with the date and his signature.

The drawee then becomes the acceptor, and by accepting the instrument engages that he will pay it according to the tenor of his acceptance and admits:

1. The existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and

2. The existence of the payee and his capacity to indorse.

If any person places his signature upon a negotiable instrument in any other capacity than as a maker, drawer or acceptor, he does so as an indorser unless he clearly indicates by appropriate words his intention to be found in some other capacity.

Every person who negotiates an instrument by delivery or by a qualified indorsement makes the following warranties:

1. That the instrument is genuine and in all respects what it purports to be.

2. That he has a good title to it.

3. That all prior parties had capacity to contract.

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

An indorser without qualification warrants the facts stated in the first three paragraphs above set forth, and further that the instrument was at the time of his indorsement valid. Such an indorser also engages that on due presentment the instrument shall be accepted or paid, or both, as the case may be, and that if it be dishonored and the necessary proceedings on dishonor be taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay the same.

The only other person who can properly accept a bill of exchange is the drawee, and upon his refusal to accept the same, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged from liability.

When a bill of exchange is formally declared to be dishonored by a notary public it is said to be protested. When such an instrument is protested it may be accepted "*supra* protest" by any one on behalf of the drawer in order to protect him from immediate suit. Any one accepting a bill *supra* protest guarantees to pay the same, provided acceptance is refused by the drawee upon a second presentation and also provided the acceptor *supra* protest is notified thereof.

There are two kinds of liability which a party undertakes by becoming a party to a negotiable instrument. He may be either primarily liable, in which event he is the principal debtor and is the party bound to pay the amount owing; or he may be secondarily liable, and in which event he promises to pay in case some one else does not. Thus the drawer of a bill of exchange guarantees to the payee and all subsequent holders of the bill that the acceptor shall pay at maturity, and that if he does not, he, the drawer, will. Likewise a man who indorses a bill or note in payment of a debt warrants that it will be paid at maturity and that if it is not, he, the indorser, will pay it. It will therefore be noted that the drawer of a bill and the indorser of a bill or note are secondarily rather than primarily liable, the liability depending on certain conditions, which must be performed by the holder. As stated heretofore, the holder must take the instrument when due to the maker or acceptor and demand payment thereof,

which proceeding is known as presentment. Furthermore, the holder of a bill of exchange must promptly notify the drawer or indorsers of its non-payment in order to hold them responsible.

Notice of Dishonor.

As it is necessary to give notice of dishonor to the drawer and to each indorser to hold them liable, let us consider the circumstances under which such notice must be given.

Notice of dishonor may be given by or on behalf of the holder or by any person to the instrument who might be compelled to pay it to the holder, and when such notice is given by or on behalf of the holder, it enures to the benefit of all subsequent holders.

The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment.

Such notice may be given by delivering it personally or through the mails. If the party to whom notice should be given is dead, notice should be given to a personal representative, and if there be none, must be sent to the last residence or place of business of the deceased.

The law requires that notice of dishonor must be given within the following times, if the person to give the notice and the person to receive notice reside in the same place:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the following day after the instrument is dishonored.
2. If given at his residence, it must be given before the usual hours of rest on the following day.
3. If notice is given through the mail, it must be deposited in the postoffice in time to reach him in the usual course on the next day.

Where, however, the persons to give and receive notice reside in different places, notice of dishonor must be given within the following times:

1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail, at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the postoffice, then within the time that notice would have been received, in due

course of mail, if it had been deposited in the postoffice within the time specified above.

Regardless of whether a miscarriage occurs through the mails, where notice of dishonor is duly addressed and deposited in the postoffice, the sender has given legal notice and is protected.

A party, upon receiving notice of dishonor, has the same time after receipt of said notice to give notice to antecedent parties that the holder has after dishonor.

It is possible for a man to waive the right to receive notice of dishonor, which may be done either before the time of giving notice has arrived or after an omission to give notice. All parties are bound if such a waiver is embodied in the instrument, but if written above the signature of an indorser it binds him only. A waiver of protest is a waiver of not only a formal protest, but also of presentment and notice of dishonor.

Failure to give notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, if it is not imputable to his default, misconduct or negligence, but when the cause of delay ceases notice must be given with reasonable diligence.

Notice of dishonor is not required to be given to the drawer where the drawer and drawee are the same person, or where the drawee is a fictitious person or one not having capacity to contract, or when the drawer is the person to whom the instrument is presented for payment. Notice of dishonor is also dispensed with where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument, or in case the drawer has countermanded payment of the instrument.

It is not necessary to give notice of dishonor to an indorser where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument, or where the indorser is the person to whom the instrument is presented for payment, or where the instrument was made or accepted for the accommodation of the indorser.

If notice has been given of dishonor by non-acceptance, notice of a subsequent dishonor by non-payment is not necessary unless in the meantime the instrument has been accepted.

Where a negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case

may be; but protest is not required except in the case of foreign bills of exchange.

If a foreign bill of exchange is dishonored by non-acceptance it must be duly protested for non-acceptance; and if such a bill has not previously been dishonored by non-acceptance, but is dishonored by non-payment, it must be duly protested for non-payment. Upon failure to properly protest a foreign bill of exchange, the drawer and indorsers are discharged.

The protest must contain a copy of the bill and be annexed thereto, it being necessary that same be under the hand and seal of the notary public making it, and that it specify:

1. The time and place of presentment.
2. The fact that presentment was made and the manner thereof.
3. The cause or reason for protesting the bill.
4. The demand made and the answer given, if any, or the fact that drawee or acceptor could not be found.

It is not necessary to make protest under such circumstances as would dispense with notice of dishonor.

Payment for Honor.

The manner in which a bill of exchange may be accepted *supra* protest has heretofore been indicated. Upon protest of a bill for non-payment, any person may also intervene and pay the same, *supra* protest, for the honor of any person liable thereon. To operate as such, payment for honor *supra* protest must be attested by a notarial act of honor, which may be appended to the protest or form an extension of it, and must be based on a declaration made by the payer for honor and for whose honor he pays.

In case the holder of a bill of exchange should refuse to receive payment, *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

As respects one another, indorsers are liable in the order in which they indorse. Each indorser promises every subsequent holder of the bill or note that they shall suffer no loss by reason of the default of the principal debtor. An indorser, therefore, although responsible for subsequent indorsees, has a remedy against any prior indorser.

Defenses Against Negotiable Instruments.

Such defenses as may be set up in a suit to recover on a bill or note are divisible into two classes: First, those known as absolute defenses; second, those known as personal defenses.

Absolute defenses are those which may be made to the payment of a bill or note, and are good against all the world, and are of three kinds: (A), those based upon the incapacity of the parties to execute a negotiable paper; (B), those based upon the invalidity of the contract in which the bill or note was given and (C), those based upon the fact that the instrument sued upon has been extinguished in law. A defense based upon any of the above grounds will defeat recovery on a bill or note.

Personal defenses are those good only against the immediate parties to a negotiable instrument, i. e., against those who have actual or constructive notice of their existence.

Defense of Incapacity.

If the party primarily liable to pay a bill of exchange or promissory note is legally incapable of executing a contract, a negotiable instrument issued by such a party is invalid, no matter into whose hands it may happen to come. Illustrations of such incapacity as will invalidate negotiable instruments are infancy, lunacy and extreme intoxication.

Defense of Illegality.

As a general rule, the fact that a bill or note was given for an illegal purpose will not constitute an absolute defense to its payment, but is ordinarily a personal defense. If, however, a statute is passed providing that a certain class of contracts shall be void, a bill or note given in pursuance of such contract is void in the hands of any holder. For example, in Pennsylvania wagering contracts are by statute declared illegal, and consequently a bill or note given to settle a bet is void. The purchaser of such a note, no matter how innocent he may have been of its illegality, can recover nothing against the maker.

Defense of Extinguishment.

The fact that a bill or note has been extinguished may always be set up as an absolute defense to its payment. A negotiable instrument may be extinguished in three ways: (1) By cancellation, (2) by alteration, and (3) by release. If the

holder of a negotiable instrument cancels it by destroying it, the same is legally extinguished, and thereafter no rights can be obtained under it. However, if the cancellation was accidental, even though the paper itself be lost, the contract is not extinguished. In such an event, as was pointed out heretofore, the holder may recover, even if he is unable to produce the bill or note, provided he gives an acceptable bond of indemnity.

An intentional alteration of a material element of a negotiable instrument by the holder thereof, or by his order, will operate as an extinguishment of the instrument. When we say a "material alteration" we mean such a change in the terms of the bill or note as will affect the rights of the parties. For instance, a change of the date, the rate of interest, amount payable, time of payment, names of the parties, etc., would be material alterations, and would render the instrument void. A material alteration, if made innocently, will not destroy a bill or note, the holder having the right to sue upon the instrument as it was originally drawn, if his act was done in good faith. Alterations made by a stranger are regarded as being immaterial. If all the interested parties on a bill or note consent to an alteration thereof, a new contract is made, and the revised instrument is regarded the same as if a new bill of exchange or promissory note had been drawn.

Extinguishment by Release.

The third means by which a bill or note may be extinguished is by a release or retransfer to the maker or acceptor at or after maturity. If, for example, the holder of a bill or note delivers the same to the acceptor or maker at maturity, upon payment of the amount due, the instrument is extinguished, and if it is again put in circulation the party primarily liable could not be compelled to pay the same a second time.

Personal Defenses.

The defenses discussed above may be made against any one, whether or not he is an innocent purchaser. Let us next consider such defenses as are good only when the party seeking to recover had actual or constructive notice that such defense existed. In other words, if the plaintiff is an innocent purchaser for value, none of the defenses which we will now consider can be made against him. Personal defenses, as previously observed, are not

available against a holder in due course. To cite a previous illustration, assume that John Doe sells Richard Roe, a horse warranted to be sound, and in payment therefor receives a promissory note. The horse having turned out to be unsound and worthless, Richard Roe returns the animal and repudiates his bargain, whereupon John Doe sues him upon the note. John Doe could not recover because he had made false representations concerning the horse, and consequently obtained the horse through fraud, which circumstance constituted a good defense on the part of Richard Roe. If, in this illustration, John Doe had transferred the note to Owen Jenkins, the defense of fraud could not be set up by Richard Roe against Owen Jenkins, because there was nothing on the face of the instrument to indicate fraud, and the defense of fraud could only be set up against the party guilty of fraud. It is necessary, however, that Owen Jenkins was ignorant of the fraud at the time he purchased the note, and, furthermore, that he gave value for it.

We note, therefore, that whenever one party has induced another by false representations to execute a bill or note he is guilty of fraud, and cannot recover against him. As fraud is not an absolute defense, any subsequent innocent purchaser could recover on the instrument.

Payment of a bill or note before maturity is a personal defense, but if the same is again put in circulation, and gets into the hands of an innocent purchaser for value prior to the date upon which it becomes due, the holder can recover.

If the execution of a bill or note is obtained through duress i. e., by force or threat of punishment or injury, the injured party has a perfect defense as against the party who is guilty of the act of duress. Duress is, however, but a personal defense, and consequently could not be set up against an innocent purchaser of value.

As between the original parties to a bill or note, absence of consideration is a good defense. Absence of consideration is to be distinguished from failure of consideration. Suppose John Doe sells Richard Roe a farm, in payment for which Richard Roe gives John Doe his promissory note. It subsequently develops that John Doe had no title to the farm, or, rather, his title turns out to be valueless. In this case the consideration has failed, and such failure of consideration is a good defense to the payment of the note as against any one who is not an innocent purchaser for value.

Discharge of Negotiable Instruments.

The Negotiable Instrument Act of Pennsylvania (Sec. 119) provides five means by which a negotiable instrument may be discharged, to wit:

1. By payment in due course by or on behalf of the principal debtor.

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

3. By the intentional cancellation thereof by the holder.

4. By any other act which will discharge a simple contract for the payment of money.

5. When the principal debtor becomes the holder of the instrument, at or after maturity, in his own right.

A person who is secondarily liable on the instrument is discharged (1) by an act which would discharge the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

However, an instrument is not discharged upon payment by the party secondarily liable thereon, but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

The law of Pennsylvania applicable to bills of exchange drawn in a set provides as follows: Where a bill of exchange is drawn in a set, and each part is numbered and contains a reference to the other parts, the whole constitutes one set. If two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is the true owner of the bill as between such holders. If the holder of a set should indorse two or more parts to different parties he becomes liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, the same as if such parts were separate bills. Acceptance of a bill drawn in a set may be written on any part, but must be written on one part only, for if the drawee accepts more than one part, and such accepted parts are negotiated to different holders, he is liable

on every such part the same as if it were a separate bill. Where the acceptor of a bill drawn in a set pays the same, and does not insist on the part bearing his signature being delivered to him, and such part at maturity is outstanding in the hands of a holder in due course, he becomes liable to the holder thereon.

With the exceptions above noted, when any one part of a bill drawn in a set is discharged by payment, the whole bill is also discharged.

Checks.

In reality a check is a species of a bill of exchange, the distinction being that it must be drawn on a bank, is payable on demand, and no acceptance is necessary. The law applicable to bills of exchange, payable on demand, likewise applies to checks.

Unless a check is presented for payment within a reasonable time after its issue the maker will be discharged from liability thereon to the extent of loss caused by delay. For example, if I neglect to demand payment of a check given me in settlement of a debt for a considerable time, and the bank on which the check is drawn should fail, I must suffer the consequences of my own carelessness and cannot hold the maker liable. But if I should simply neglect to deposit a check until after the maker has withdrawn his funds, I can still recover on the check. The safest course is to deposit a check within twenty-four hours after receiving the same.

We observed that in the case of a bill of exchange the drawee was not liable until he first accepts the same. In the case of a check the drawee does not accept at all. Hence the drawee (the bank) is under no liability to pay the check to the holder, a check being merely an order on the bank to pay a certain sum from the funds belonging to the drawer. If the drawer's credit is injured by the bank's refusal to pay a check when the maker had sufficient funds in bank to meet it, the bank may be sued by the maker of the check, but the payee has no right of action against the bank.

Certified Checks.

A check does not operate as an assignment of the funds of the maker to the amount thereof, but if the check is certified there is an assignment of the funds in bank. When a bank certifies a check its proper officer, either the president or cashier,

indorses it "Good" or "Certified," with his signature or stamp, which act is equivalent to an acceptance.

A bank by certifying a check sets aside sufficient funds belonging to the drawer to pay the amount mentioned therein, and the funds become the property of the holder of the certified check. The holder may sue the bank to recover upon refusal to pay a certified check. The drawer is under no further liability after the check has been certified.

Drafts.

The word draft is indiscriminately applied to checks, bills of exchange or to non-negotiable orders for the payment of money. This application of the word is not entirely erroneous, but it is more correctly applied to instruments in the form of bills of exchange that are drawn for the purpose of collecting for the drawer's own use and account sums of money due him from sundry persons. If the drawer procures money on draft before it is paid, it becomes technically a bill of exchange. The payee of the draft is usually the person or institution delegated by the drawer to make the collection, and it is delivered or sent by mail to the payee for that purpose. Banks or express companies usually perform this service, making a small charge therefor. The drawer usually places such drafts with his bank for collection, but in many instances the drawer draws them payable to some bank in the place where the debtor lives, and mails them to such bank with the request that the bank collect and remit this amount, less collection charges.

Bills of lading, which are negotiable, will be considered in connection with the subject of common carriers, to which they more directly appertain.

Conflict of Laws.

Although the law governing negotiable instruments has been made practically uniform throughout the United States, the law differs in many material regards in different jurisdictions. In concluding the subject of negotiable instruments let us briefly summarize the rules regulating cases where the law of one State conflicts with the law of another. Suppose a bill of exchange is drawn in Pennsylvania upon a man living in New Jersey, directing him to pay a sum of money to a party living in Delaware. The payee negotiates the instrument in New York and the parties when a dispute arose lived in Maryland.

The law of the place where the contract was made—in our illustration Pennsylvania—will govern all questions regarding the making of the contract; in other words, the law of Pennsylvania would determine whether the bill was drawn up properly and was negotiable. The law of New Jersey, which in our illustration is the place where the contract was to be performed, would govern the liability of the maker of the note or the acceptor of the bill, and would also determine whether days of grace should be allowed, and also whether the bill should be protested for dishonor. The law of New York where the bill was negotiated, would govern the question whether or not a proper transfer had been made and legal title vested in the present holder. Lastly, the law of Maryland, the State wherein suit was brought, will govern all questions of evidence and all questions covering the Statutes of Limitations; in other words, the law of Maryland will regulate the time within which suit must be brought, and the admissibility of evidence produced in such suit and necessary to sustain the same.

REAL ESTATE AND CONVEYANCING.

Definition—Land—Tenements—Hereditaments—Landlord and Tenant—Leases—Distress—Recovery of Possession—Forcible Entry and Detainer—Mining Leases—Fees—Dower—Mortgages—Remainders and Reversions—Intestate Act 1833—Title by Purchase—Deeds—Title by Matter of Record.

WE are informed by Holy Writ that in the beginning of the world God gave to man "dominion over all the earth," etc., which gift constitutes the only true and solid foundation of man's dominion over external things. It has been already pointed out that law was divided into two main divisions—(1) the law applicable to personal rights and wrongs, and (2) the law-governing property, property being of two varieties, personal property and real property.

Originally the crudest division of property was into things movable and things immovable. Land is immovable, and every other species of property is movable except such as is fastened or attached to land. The term "real" property or real estate, as referable to things immovable, was developed later, about the beginning of the seventeenth century, and arose from the nature of the legal action taken to redress injury to this class of property. It is impossible in a treatise of this kind to trace the theory and development, through successive ages, of a man's right to acquire, possess and dispose of real estate, interesting and instructive as such an inquiry would be, and it must therefore suffice for us to ascertain what is the "Law of Real Estate" to-day. After we have found out what the term real estate comprises we will then be in a better position to consider "Conveyancing," or the means whereby an estate in real property may be transferred or conveyed.

An estate is an interest in a thing, as distinguished from the thing itself; and real estate is, literally speaking, an interest (estate) in a real thing, the term "real," in its technical sense, applying to property of a permanent, fixed and immovable nature.

Following in brief the classification employed by Blackstone, things real comprise lands, tenements and hereditaments.

The term "land" has a very wide meaning legally, comprehending any ground, soil or earth, and also water, which is an apparent solecism. But suppose, for example, I seek to obtain title to a certain tract of land upon which is located a large body of water. Such property must be referred to as so much land covered with water. Water being a movable substance, the owner of the land underlying the water has only a temporary or usufructuary property therein, which will be better understood when we consider the rights of riparian owners. Land also in its legal signification extends indefinitely upward and downward. Therefore, no man can erect a building upon my land, or which would overhang my land, without my consent. Furthermore, the owner of the surface of the earth owns everything beneath his boundaries to the center thereof, as is everyday experience in the mining regions of this country. Hence by the use of the word "land" in a grant everything terrestrial will pass.

The term "tenement" has a still wider meaning than the term "land," and, although it is commonly applied to houses and other buildings, legally it means everything of a permanent nature that can be held, including property which is perceptible to the senses, such as lands and merchandise, as well as property or estates of an imperceptible nature, such as rights of way through the property of another and other rights and interests which arise out of, or are in any degree connected with, or exercisable within land or real estate.

The term "hereditament" has the broadest meaning of all, including not only lands and tenements, but also whatever may be inherited, whether it be corporeal (rights which are visible) or incorporeal (rights which are invisible), real, personal or mixed.

We, therefore, observe that real estate consists in such interest as a man may have in things real, viz., lands, tenements and hereditaments, and the law of real estate is the science which ascertains and defines the rights and obligations of men in their relations to each other in respect to land.

Before entering into a more detailed discussion of the law of real estate it is necessary to note certain further distinctions between real and personal property, which is important (1) because of the difference in devolution, (2) because of the difference in liability for debts, and (3) because of the conversion of realty into personalty and personalty into realty which results from the operation of certain equitable doctrines.

Upon the death of the owner of real estate the same passes

to his heirs-at-law, whereas title to the personal property of which a decedent dies possessed passes to his executor or administrator.

The law of Pennsylvania governing executions provides that both in life and after death the personal property of a man is primarily liable for his debts. In other words, his real estate cannot be sold until it is first shown that his personal property is insufficient to pay his indebtedness.

Real estate may be converted into personal property, as, for example, when a man in his will directs that his real estate shall be sold and the proceeds divided in a certain manner. In such event the real estate is to all legal purposes regarded as personal property. We also noted in our study of partnerships that land or real estate owned by a partnership is regarded as personal property. There are many other conditions under which real estate is converted into personal property, which we will discuss more at length later.

Vice versa, personal property may likewise be converted into real estate. Fragments of a dwelling house, blown down by a hurricane, although in their changed state partaking of the nature of personal property, are regarded as real estate. A key to a lock fastened upon a door is also considered as realty. Where in a will money is directed to be invested in real estate it becomes real estate upon the death of decedent.

Composite Character of Same Property.

Again property may at the same time partake of the nature of real estate and personalty. For illustration, a factory owned by a corporation is in reality real estate, but, as constituting a part of the property owned and represented in the form of stock by the members of the corporation, the same is personal property. Growing crops are personal property, but if the land is sold they pass as part of the real estate.

The owner of land, through or by which a stream of water runs, has the right to receive the flow of the water in its natural or accustomed channel, "without diminution in quantity or deterioration in quality" to any substantial extent. Any right which confers the privilege of interfering with this natural flow is an easement.

If water constitutes a swamp or percolates through the soil and flows in no regular channel, the owner of the land may draw the water from the swamp or divert the percolation.

Lateral Support.

The third kind of easement mentioned is that of lateral support, which is the right of one land-owner to have his land and the structures thereon supported by the adjoining land. In making excavations for building purposes, one must do so in a manner not to injure his neighbor's land. In large cities every man is compelled so to build his walls that the adjoining land-owner may enjoy the right to construct a building to the verge of the boundary line.

Drain and Drip.

It is a well-established rule of law that no action can be maintained for unavoidable damage to another's land in the lawful use of one's own land. No man, however, has the right to drain the water from his own land upon the land of another except through natural channels.

It is very common in towns and cities to receive or drain off water, through pipes laid on another's land. But the right of drip, which is the right to discharge rain water from the eaves or gutters upon the land of another, is not so common.

Burial Lots and Pews.

The owner of a burial lot in a cemetery enjoys only an easement, which is the right of interment in the cemetery. The purchaser of a cemetery lot buys the same with the understanding that a change of circumstances may necessitate a change of location. He does not purchase the ground outright. Similarly the owner of a pew in a church has only an easement, for if the church is destroyed by fire or otherwise, the pew-owner's right is gone. Should the church be rebuilt, or changed to a new location, the owner of the pew would have no claim to his seat.

Every easement must originate by grant or agreement, either express or implied. Where an easement has existed for twenty-one years and over, a grant is implied. Such an easement is termed prescriptive. An easement by express grant is created by expressly reserving the same in a deed.

Easements may be extinguished by a release, abandonment, merger or cessation of the purpose or necessity of the easement.

The last and most important class of incorporeal hereditaments is rents. Rent may be defined to be a periodical and certain profit issuing out of lands and tenements. The three species of rents existing at common law have become practically

obsolete, and, therefore, the rents which we will consider are (1) ground rents and (2) ordinary rents incident to the relation of landlord and tenant.

Ground Rents.

A ground rent is a certain sum of money which the grantor of land reserves to himself and his heirs, to be paid at regular periods out of the land conveyed. Ground rents are real estate, and pass to the heir; they may be mortgaged and are bound by a judgment, but are not liable for any part of the taxes assessed upon the owner of the land out of which the rent issues. Formerly, if there were no clause of redemption in the deed creating the ground rent, such ground rent would be irredeemable. By statute irredeemable ground rents cannot be created.

If the owner of the ground rent should obtain title to the land out of which it issues the rent is extinguished by merger. Ground rents may also be extinguished by release. Should the ground rent be in arrears the owner may recover same by distress proceedings or by an ordinary action in *assumpsit* (debt). The right of exemption is usually waived in a ground rent deed, but if not may be claimed.

Rent.

The next species of rent which we shall consider, and by far the most important, is the ordinary rent incident to the relation of landlord and tenant. Such rent had its origin in the rent service of feudal times. In the Middle Ages a man was required to render to his lord a certain amount of military service in payment for the use of such land as was allotted him. When military service was no longer required, the owner of the land substituted the payment of money in lieu thereof.

To-day such rent is reserved to the owner of lands and buildings under the form of a lease, which may be either written or oral. The Statutes of Frauds provide that a lease for a longer term than three years shall be in writing, otherwise it shall be deemed a lease from year to year. Frequently an agreement is entered into for a lease preparatory to executing one. In such case the agreement should be specific as to the details to be included in the lease. If the agreement for a lease is made orally, and the tenant is given possession of the premises and makes improvements thereon in view of such agreement, a Court of Equity will compel the execution of the lease agreed upon.

Definition of a Lease.

A lease is a contract for the possession of lands and tenements in consideration of the payment of rental therefor. In every lease there must be a lessor able to grant the land, a lessee capable of accepting the grant, and property capable of being granted. The rent payable under a lease may be in money, services or in any stipulated article, such as grain or ore.

Implied Lease.

If a tenant remains in possession of the demised premises after the expiration of the term of the lease, and pays rent, the law will imply that the lease has been renewed for another term (usually from year to year) subject to the same rent and other agreements contained in the original lease.

In many instances the owner of property places the renting thereof in the hands of an agent. A lease by an agent should be in the following form: "John Doe by Richard Roe, agent." Unless an agent discloses the fact of his agency he becomes personally liable. A lease signed by one partner for property used by the partnership, enures to the benefit of the firm, and is as much a partnership transaction as a sale of partnership goods by a partner would be; a partner taking a lease in his own name holds the property in trust for the firm.

A lease signed by a minor is not void, but may be voided when the minor reaches majority. If a minor holds possession of leased property after becoming of age, he is liable for past and future rent under a lease made during minority. A married woman may, by Act of Assembly, lease her real estate, and make any contract in writing or otherwise which may be necessary to the enjoyment of her right to lease. A married woman may also become a lessee of real estate.

If property is leased to a corporation it is advisable to see that the Board of Directors have authorized the lease. It is not necessary for a corporation to affix its corporate seal to a lease, and use by a corporation of leased premises is a ratification of the lease by its officer or agent.

An executor or administrator has no power to lease real estate, but a trustee may lawfully do so.

It is not necessary in a lease to describe the premises demised with the same particularity as in a deed.

It is sufficient to describe the property in a general way, and it is best to give the street number, if any. If not, the de-

scription should be sufficiently specific to comply with the law regarding ejectments, of which more hereafter. It is no defense to the payment of rent that the premises are described as being located on the wrong corner.

The duration of the lease should always be set forth therein. If a tenant rents by the month he has the right to terminate the lease at the end of the month. In computing the term of a lease, the first day is included, and the last day excluded. For example, if property is leased for one year from the first day of April, the lease would expire on the last day of the following March.

The date upon which rent is payable should be clearly set forth in the lease. If no time for the payment of rent is mentioned, it is payable at the end of the term.

If the landlord sells leased property, the rent falling due after date of sale is payable to the purchaser, but in Philadelphia county it is the custom to apportion rent to the date of settlement. A tenant who has assigned his lease, even with the landlord's consent, remains liable to pay rent unless the landlord expressly releases him from such obligation. If rent is due and unpaid at the date of the landlord's death, it is payable to his executors, but if the landlord dies before the rent becomes due, it is payable to the heir of the landlord.

If leased premises are wholly destroyed by fire the tenant is, nevertheless, liable to pay rent for the balance of his term, and the landlord is not obliged to rebuild. This rule may seem unjust, but it is the law. To protect himself a tenant should provide in the lease against such a contingency.

Repairs.

Unless so provided in the lease, the landlord is not liable to repair the leased premises. It is usual in a lease to provide that the landlord shall make only repairs of a permanent nature, such as putting on a new roof, etc., and that the tenant shall make all tenantable repairs, such as putting in windows or doors, repairing fences, keeping the premises wind or water-tight to prevent waste and decay. Under a covenant in a lease to make repairs a tenant is not bound to repair injuries caused by what are called "Acts of God" (cyclones, etc.), or of a public enemy.

It is policy as a matter of protection for a landlord to stipulate in a lease that it shall not be assigned without his consent. An assignment by act of law, such as in bankruptcy, execution upon a judgment, etc., is not a breach of covenant not to as-

sign. To avoid such a result, leases frequently have a provision against involuntary assignments, for illustration—"nor shall the lessee assign the term hereby granted, or underlet the premises, without the written consent of the lessor indorsed thereon, an assignment within the meaning of this lease being understood and intended to comprehend not only the voluntary action of the lessee, but also every levy or sale on execution or other legal process, and every assignment or sale in bankruptcy or insolvency, or under any other compulsory procedure or order of Court."

Re-Entry.

A landlord has the right to forfeit the lease and re-enter the premises upon default of the tenant in payment of rent or default of any of his agreements. Formal demand must first be made.

It is a settled rule of law that a tenant cannot dispute the title of his landlord, and, if he do so, the landlord may elect to annul the lease.

It is advisable to have the signatures to a lease properly witnessed.

Sometimes a landlord requires a tenant to furnish security for the payment of rent, and when a third party covenants to be responsible for the performance of the terms and conditions of the lease on the part of the lessee, such surety becomes responsible immediately upon the default of the tenant to pay his rent. If the parties to the lease materially alter its terms the surety is released from all liability.

Power to Mortgage.

It is provided by the act of April 27, 1855, that every lessee for a term of years of any colliery, mining land, manufactory or other premises may mortgage his lease with all the buildings, fixtures and machinery thereon. The mortgage must be acknowledged and recorded with the lease, and such mortgage will not interfere with the landlord's rights, priority or remedy for rent. Under this act a mortgage will bind any machinery brought into a mill or factory after its execution and recording.

Sub-Leasing.

There is an important distinction between an assignment of a lease and underletting. An assignment of a lease is where the whole term is transferred by the tenant. An underletting is where a tenant transfers less than his whole term. Every

underlessee becomes tenant to the lessee who grants the underlease, and not tenant to the original lessor. In the absence of any provision in the lease to the contrary, a tenant may either assign or sublet, and, as we observed above, a covenant not to assign is not broken by an underletting. As long as he holds the lease, an assignor is personally liable for the payment of rent to the original landlord.

Upon the death of a tenant a lease will vest in his executors or administrators as personal property, and if the executors or administrators take possession of the premises they become liable as assignees.

If a tenant during the term of his lease makes an assignment for the benefit of creditors, the trustees under such an assignment may make such use of the lease as may be beneficial to the creditors. The landlord, under the act of May 26, 1901, is entitled to receive out of the proceeds of the sale of any goods upon the leased premises the rent due him at the time the assignment was made to the extent of one year's rent.

Recovery of Possession for Non-Payment of Rent.

A landlord is given the right by the act of April 3, 1830, to recover possession of the leased property for non-payment of rent. If the tenant shall refuse to pay rent as provided in the lease, and there are not sufficient goods upon the premises to pay the rent in arrear, except such articles as are exempt from levy and sale by the laws of this Commonwealth, the landlord may give the tenant notice to vacate the premises within fifteen days from the date of the notice, if such notice is given between April 1 and September 1, and within thirty days if notice is given between September 1 and April 1. If the tenant refuses to vacate and deliver up the premises according to said notice, the landlord may make complaint, under oath, before a Justice of the Peace or Magistrate, and upon averment of the above facts the tenant may be summoned to appear, not less than three nor more than eight days, after service of a summons and answer the landlord's complaint. The Justice of the Peace or Magistrate shall then hear the case, and if it appear that the landlord's complaint is just and true, judgment is entered against the tenant that the premises be delivered up to the landlord, and, at the request of the landlord, a writ of possession may be issued, directed to a constable, commanding him to deliver possession of the premises to the landlord and levy costs on the tenant (defendant). The tenant may at any time before the writ of pos-

session is executed pay the constable the rent due and in arrear, with costs, and thus retain possession of the premises. The writ of possession cannot be issued until five days after the judgment is entered.

In the city and county of Philadelphia, the landlord is protected by the act of March 25, 1825, in cases where a tenant for a term of years removes from the premises. If such a tenant remove without leaving sufficient property on the premises to secure the payment of at least three months' rent, or shall refuse to give security for the payment thereof within five days after demand is made for such security, and shall refuse to deliver up possession of said premises, the landlord may, upon making affidavit of the facts before a Magistrate, have the tenant summoned to appear, not less than five or more than eight days after service of said summons, and answer his complaint. Upon proof of the facts by the landlord, judgment will be entered in his favor and a writ of possession may be issued directing a constable to deliver over the premises to the landlord.

Under this act a sub-tenant is entitled to the right of tendering security for rent.

The important subject of a landlord's right to distrain for rent will be considered later on.

The most effective remedy provided by law for the protection of a landlord is the right of distress, which right has been inseparably connected with the ordinary relation of landlord and tenant since the feudal ages.

In Pennsylvania, distrains for rent are regulated by the act of March 21, 1772, which provides substantially as follows: A landlord having any rent in arrear or due upon any lease, may distrain upon the goods located on the leased premises provided such distress be made during the continuance of the lessor's title or interest. Although a landlord may personally distrain without the intervention of a Constable (a Constable not being required until the inventory and appraisalment shall be made), it is advisable to have a Constable to attend to the matter from the beginning, so as to have the benefit of his knowledge and experience. A correct statement of the rent due should be handed to a Constable, together with a warrant authorizing him to distrain. In distraining for rent, interest should not be added to the rent.

Goods Liable to Distress.

A tenant's cattle or stock feeding or depasturing upon all or any part of the leased premises, all sorts of corn, grass, hops,

roots, fruits, pulse or other product whatsoever, which may be growing on any part of the premises, may be taken and seized as a distress for arrears of rent, and after the same have been appraised, they may be sold in satisfaction of the rent in arrear, and costs of distress proceedings. The act further provides that the purchaser of such corn, etc., shall have free egress and regress to and from the same where growing, to repair the fences from time to time, and when ripe, to cut, gather up and carry away the same, in the same manner as the tenant might legally have done had such distress never been made.

With the exceptions hereinafter noted, all goods located on the leased premises may be levied upon under a distraint proceeding for the collection of rent. The goods of a stranger on the premises and those of a sub-tenant are liable; also goods on storage not with a warehouseman, and goods of a mere renter of rooms. Such fixtures as are slightly attached to the premises, and which a tenant might remove at his pleasure, would also be subject to a landlord's levy.

Goods Privileged from Distress.

Unless a tenant in his lease has waived his right to claim the benefit of the Exemption law, he may by the act of April 9, 1849, have exempted from distress for rent property to the value of \$300 exclusive of all wearing apparel of the tenant and his family, and all Bibles and school books in use in the family. Implements of trade in actual use, chattels delivered to a person exercising a public trade, goods which cannot be restored again in the same condition and goods in the custody of the law cannot be distrained upon.

Furthermore, if property is placed in the possession of a tenant by those with whom he deals in business, such property is not liable to distress for rent. To illustrate, goods on storage with a warehouseman, the property of a guest at a hotel, the goods of a boarder, grain sent to a mill, cloth in a tailor's shop, and goods on a wharf.

All leased or hired pianos, melodeons and organs are by the act of May 13, 1876, exempt from levy and sale on execution and distress for rent due by such person or persons so leasing or hiring the same. It is necessary, however, that the owner of any such piano, melodeon or organ, or his or their agent, or the person so leasing or hiring the same, shall give notice to the landlord or his agent that the piano, etc., is leased or hired. The notice required under the provisions of this act should be given

to the landlord when the instrument is delivered to the tenant or before the right of distress has accrued.

Likewise sewing machines belonging to seamstresses are exempt from distress by the act of April 17, 1869, and by the later statute of March 4, 1870, any sewing machine owned by a private family is also exempt.

Proceedings on a Distraint.

When a landlord has distrained upon the goods contained on leased premises the tenant or owner of the goods distrained upon must, within five days after such distress and notice thereof, replevy the same with sufficient security according to law. After distress, notice thereof, and the expiration of said five days, the landlord must have the goods distrained upon appraised by two appraisers. He may then, after six days' public notice, sell the goods and chattels so distrained at the highest figure that can be obtained therefor.

Penalties for Illegal Distress.

It sometimes happens that a landlord will distrain upon a tenant's goods when no rent is in arrear or for more rent than is actually due.

The law provides that if a landlord distrains and sells a tenant's goods when it shall be proven that no rent is in arrear, the tenant may by action of trespass recover double the value of the goods or chattels so distrained and sold, together with the full costs of suit.

The rent must be certain or that which can be made certain, and if a landlord distrains for more rent than is due he renders himself liable therefor.

The law has a high regard for the sanctity of a man's home, and a landlord in making a distraint for rent is not allowed to break open an outer door to a residence or break open or tear down gates or inclosures for that purpose; but if a door or window is open, the landlord may enter, and when once in may break open inner doors.

If, after having made the distraint, he is refused admission, the landlord may for the purpose of proceeding with the distraint, break open an outer door, but must avoid, in so doing, a breach of the peace. If the leased property is used for business purposes, where everyone having business to transact is invited to enter by lifting a latch during business hours, a land-

DEED

This Indenture, Made the

day of

in the year of our Lord

one thousand nine hundred and

Between

of the second part: **Witnesseth,** That the said part of the first
part, for and in consideration of the sum of

lawful money of the United States of America, well and truly paid by the said part of the second part to the said part of the first part, at and before the enscaling and delivery of these presents, the receipt whereof is hereby acknowledged, granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said part of the second part, heirs and assigns,

Together with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof: **And also,** all the estate, right, title, interest,

property, possession, claim and demand
whatsoever, both in law and equity, of the said part of the first
part, of, in, and to the said premises, with the appurtenances:

To have and to hold the said premises, with all and singular
the appurtenances, unto the
said part of the second part, heirs and assigns, to the
only proper use, benefit, and behoof of the said part of the
second part, heirs and assigns forever.

And the said heirs,
executors and administrators, **do** by these presents, covenant,
grant and agree to and with the said part of the second part,
heirs and assigns forever, that the said

heirs, all and singular the hereditaments and
premises herein above described and granted, or mentioned and
intended so to be, with the appurtenances, unto the said part of
the second part, heirs, and assigns, against the said
heirs, and against all and
every other person or persons whomsoever lawfully claiming or to
claim the same or any part thereof,

Shall and Will

Warrant and forever Defend.

In Witness Whereof, the said part of the first part
to these presents hereunto set hand and seal Dated the day
and year first above written.

Signed, Sealed and Delibered
IN THE PRESENCE OF US:

}

L.S.

L.S.

Received, the day of the date of the above Indenture, of the
above-named

State of
County of

} ss.

On the day of Anno Domini 19 , before me,

personally appeared the above-named

and in due form of law acknowledged the above **Indenture** to be
their and each of their act and deed, and desired the same might be
recorded as such; and the said

being of full age, and separate and apart
from said husband by me thereon privately examined, and the
full contents of the above Deed being by me first made known unto
did thereupon declare and say that did voluntarily, and
of own free will and accord, sign, seal, and
as act and deed, deliver the above-written
Indenture, Deed, or Conveyance, without any
coercion or compulsion of said husband

Witness my hand and
seal the day and year aforesaid.

Deed

Recorded in the Office for Recording of Deeds in and for
in Deed Book No.
page &c.

Witness my hand and seal of Office this
day of Anno Domini 19

TRUSTEE'S DEED

This Indenture, *Made the*
day of
one thousand nine hundred and
Between

in the year of our Lord

of the one part, Grantor , and

of the other part, Grantee
Witnesseth, *That the said Grantor for and in consideration of the*
sum of *lawful*
money of the United States of America, unto *well and*
truly paid by the said Grantee at and before the sealing and delivery
of these presents, the receipt whereof is hereby acknowledged
granted, bargained, sold, aliened, released and confirmed,
and by these presents

grant, bargain, sell, alien, release
and confirm unto the said Grantee *and Assigns*

Together *with all and singular the* *improvements,*
ways, streets, alleys, passages, waters, water-courses, rights, liberties,
privileges, hereditaments and appurtenances whatsoever thereunto
belonging, or in any wise appertaining, and the Reversions and
Remainders, Rents, Issues and Profits thereof; and all the estate,
right, title, interest, use, trust, property, possession, claim and
demand whatsoever of

, in
law, equity, or otherwise howsoever, of, in, and to the same and every
part thereof

To have and to hold *the said*

hereditaments and premises hereby granted, or mentioned and
intended so to be, with the appurtenances, unto the said Grantee
and Assigns, to and for the only proper use
and behoof of the said Grantee *and Assigns*
for ever.

And the said

do by these presents, covenant, promise
and agree to and with the said Grantee and
Assigns, that the said

ha not done, committed, or knowingly or willingly suffered to be
done or committed, any act, matter or thing whatsoever whereby the
Premises hereby granted or any part thereof, is, are, shall or may be
impeached, charged or incumbered, in title, charge, estate, or other-
wise howsoever.

In Witness Whereof

Sealed and Delivered
IN THE PRESENCE OF US:

}

Received the day of the date of the above Indenture of the above
named Grantee

WITNESS AT SIGNING:

}

On the day of **Anno Domini**
19 , before me the subscriber, personally appeared

SATISFACTION OF MORTGAGE

State of _____ }
County of _____ } ss.

Know all Men by these Presents, That

of the _____ of _____ County
of _____ and State of _____
do hereby certify that a certain Indenture of Mortgage, bearing date
the _____ day of _____, A. D. 1____, made and
executed by

of the _____ of _____ County
of _____ and State of _____ to secure
the payment of

_____ DOLLARS, and recorded in the office of the
Recorder of Deeds, etc., in and for said County of _____
in Mortgage Book _____, Page _____, on the _____ day of _____
_____, A. D. 1____, the receipt of the payment thereof and satis-
faction in full of debt and interest on the above-stated Mortgage
do hereby acknowledge. And _____ do by these presents authorize the
Recorder of Deeds in and for said County of _____ to enter satisfac-
tion in full of the above-stated Mortgage and discharge the same from
record.

In Witness Whereof, _____ have hereunto set _____ hand and
seal this _____ day of _____, A. D. 19____

State of _____ }
County of _____ } ss.

in and for said County, personally came the above-named

personally known to me to be the person named in and who executed
the above instrument, and acknowledged that he executed the same
for the full intent and purpose therein mentioned, and desires the same
to be recorded as such.

Witness my hand and seal, this _____ day of _____, A. D. 19____



BOND

Know all Men by these Presents, That

held and firmly bound unto

in the sum of
lawful money of the United States of America, to be paid
to the said

certain Attorney, Executors, Administrators or Assigns; to which
payment well and truly to be made,

Heirs, Executors and Administrators,
firmly by these Presents. Sealed with
Seal Dated the *day of* *in the year of our Lord*
one thousand nine hundred and

The Condition of this Obligation is such, That if the above-
bounden

Heirs, Executors, Administrators, or any of them, shall and do well
and truly pay, or cause to be paid unto the above-named

certain Attorney, Executors, Administrators or
Assigns, the just sum of

without any fraud or further delay; then the above Obligation to be
void, or else to be and remain in full force and virtue.

Sealed and Delibered }
IN THE PRESENCE OF US: }

L.S.

L.S.

MORTGAGE

This Indenture, Made the

day of

Lord one thousand nine hundred and

Between

in the year of our

of the other part.

Whereas, the said

in and by

stand **hand and seal** **Obligation or Writing obligatory under**
duly executed, bearing even date herewith
bound unto the said

in the sum of

*without any fraud or further delay, as in and by the said
recited Obligation and the Condition thereof, relation being there-
unto had may more fully and at large appear.*

Now this Indenture witnesseth, That the said

as well for and in consideration of the
sum of
aforsaid debt or

*and for the better securing the payment of the same, with interest,
unto the said* **Executors,**

Administrators and Assigns, in discharge of the said

recited Obligation as for and in consideration of the further sum of
One Dollar unto **in hand well and truly paid by the**
said

*at and before the sealing and delivery hereof, the receipt whereof is
hereby acknowledged, granted, bargained, sold, aliened,
enfeoffed, released and confirmed, and by these presents
grant, bargain, sell, alien, enfeoff, release and confirm unto the said*

Heirs and Assigns,

Together with all and singular

Ways, Waters, Water-Courses, Rights, Liberties, Privileges, Improvements, Hereditaments and Appurtenances, whatsoever thereunto belonging, or in any wise appertaining, and the Reversions and Remainders, Rents, Issues and Profits thereof,

To have and to hold the said

Hereditaments and Premises hereby granted, or mentioned and intended so to be, with the Appurtenances, unto the said

Heirs and Assigns, to and for the only proper use and behoof of the said
Heirs and Assigns forever.

Prohibited always, nevertheless, that if the said

Heirs, Executors, Administrators or Assigns, do and shall well and truly pay, or cause to be paid, unto the said
Executors, Administrators or Assigns, the aforesaid debt or *sum of*

on the *day and time* *hereinbefore mentioned and appointed for payment of the same, together with interest as aforesaid, without any fraud or further delay, and without any deduction, defalcation, or abatement to be made of any thing, for or in respect of any taxes, charges or assessments whatsoever, that then, and from thenceforth, as well this present*
Indenture, *and the estate hereby granted, as the said recited Obligation shall cease, determine and become void any thing hereinbefore contained to the contrary thereof, in any wise notwithstanding.*

In Witness Whereof, *the said part* *of the first part to these presents* *hereunto set* *hand and seal* . *Dated the day and year first above written.*

Sealed and Delibered
IN THE PRESENCE OF US: }

L.S.

GENERAL LEASE

This Indenture, Made the
day of
one thousand nine hundred and
Between

in the year of our Lord

who hereinafter called the Lessor and who hereinafter called the Lessee, **Witnesseth**, That the said Lessor for and in consideration of the payment of the rent and performance of the covenants and agreements hereinafter mentioned and contained, which on the part of the said Lessee heirs, executors, administrators and assigns, is and are to be kept, done and performed, demised, leased and to farm let, and by these presents demise, lease and to farm let, unto the said Lessee heirs, executors, administrators and assigns, **All that certain** Farm, Messuage, Tenement, Tract or Piece of Land situate

To have and to hold the said hereby demised, with the appurtenances, unto the said Lessee heirs, executors, administrators and assigns, from the for and during the full end and term of from thence next ensuing: **Yielding and paying** therefor and thereout and delivering unto the said Lessor heirs and assigns, the yearly rent, the full part of

with full power to the said Lessor heirs and assigns, to recover the said yearly rent hereby reserved, in the same manner that rents due upon leases now are, or hereafter shall be by law recoverable, with waiver of exemption under the Act of April 9th, 1849, or other acts of exemption subsequently passed, and for want of sufficient distress to satisfy the said yearly rent and the charges of levying the same, then and in such case it shall and may be lawful for the said Lessor heirs and assigns, into and upon the said hereby demised premises, wholly to re-enter, and therefrom and thereout forthwith, without any further legal proceedings, to dispossess the said Lessee heirs, executors, administrators and assigns, and the same to have again, repossess and enjoy, as in first and former estate and title in the same, and as though this Indenture had never been made, any thing hereinbefore contained to the contrary notwithstanding. And the said Lessee heirs, executors, administrators and assigns, covenant, promise and agree, to and with the said

Lessor heirs and assigns, by these presents, that the
said Lessee heirs, executors, administrators or assigns, shall
and will well and truly pay and yield and render the said yearly
rent hereby reserved, and every part thereof, to the said Lessor
heirs and assigns, on the days and times, and in the quotas and
proportions hereinbefore mentioned and appointed for payment
thereof, without any fraud or further delay,

and at the end of the said term, quietly and peaceably yield up and
surrender the possession of the said
to the said Lessor

And the said Lessor heirs, executors, administrators and
assigns, hereby covenant, promise and agree, to and with
the said Lessee heirs, executors, administrators and
assigns, that the said Lessee heirs, executors,
administrators or assigns, paying the said yearly rent, in manner
aforesaid, and performing the covenants and agreements
herein on part contained, shall and may peaceably and
quietly have, hold, occupy, possess and enjoy, the said demised
premises, with the appurtenances, during the said term, without any
hindrance, molestation or eviction of the said Lessor heirs
or assigns, or of any person or persons claiming under

And the said Lessee do hereby for and heirs,
executors, administrators and assigns, covenant, promise and agree
to and with the said Lessor heirs, executors, administrators
and assigns, by these presents, in the following manner, to wit:

That will thresh out, deliver, and place the said Lessor
share (winter and summer) as soon as threshed and cleaned in such
bins as Lessor may designate, and the corn as soon as husked in
cribs designated and shell the same when required by Lessor .

That the Lessee will haul the Lessor share of grain, oats,
corn, hay and other products of the farm, and unload and deliver the
same, in such manner and to such person and at such place or
market, as the said Lessor may direct, not more than
miles from the farm without charge.

That will not take or suffer to be taken from said premises,
and will not sell or give away, or otherwise dispose of, any hay,
straw or corn-fodder upon or raised on said premises, nor suffer
the same or any part thereof to be taken from said premises without
consent in writing by Lessor , but shall properly use up the same
upon said farm; that the right of property in the whole and every
part of said crops until set apart and divided, and of the manure,
hay, straw and corn-fodder shall be absolutely and exclusively in said
Lessor heirs and assigns; and Lessee shall have no right,
title or interest in or power or control over said manure, hay, straw and
corn-fodder, or any part thereof, except to apply and make use of

said Lessee shall find Timothy seed and Clover
seed and one half of seed-grain

The Lessee shall repair, rebuild and keep up fences cutting and hauling the rails

keep premises in good order, fence-rows, ditches, and runs cleaned up and clear of weeds and bushes, and drains kept open.

The Lessor except and reserve thereout unto heirs and assigns, the full and free right and liberty of entry and re-entry, and of ingress and regress in, upon, into or through said premises, and every part thereof, at any and all times during said term, for the purpose of superintending, improving or viewing the same, or of directing or examining the work or the condition of the repairs thereof, for the purpose of improving or amending the said premises, if desired by the Lessor, or for any lawful purpose or purposes whatever.

And reserve all timber-trees, with full and exclusive right to enter on the premises for cutting or hauling.

And reserve room sufficient in barn and farm buildings for storage of Lessor share of crops, with the right of access for the purpose of hauling the same away.

The Lessee shall not underlet without consent in writing.

If Lessee shall not keep, observe, perform and fulfill the conditions, covenants and terms of this lease, then it shall cease and absolutely determine; and any attorney may immediately thereafter as attorney for said Lessee at the sole request of the Lessor, sign an agreement for entering in any court of competent jurisdiction, an amicable action of ejectment, with confession of judgment therein, in favor of the said Lessor and against the said Lessee, and all persons claiming under for the immediate recovery for the said Lessor of possession of the hereby demised premises, without any stay of execution, and with a release of all errors, and with costs of suit, and for all this, this shall be a sufficient warrant; and thereupon a writ of Habere Facias Possessionem may issue forthwith with release of errors in all proceedings thereon, or concerning the same; and the Lessee agree that no writ of error, exception or objection may be made thereto. No such determination

of this lease, or taking possession of the premises shall deprive the Lessor of any action against the said Lessee for rent or damages.

In witness whereof, have hereunto set hand and
seal , the day of , one
thousand nine hundred and]

Scaled and Delivered
IN THE PRESENCE OF }

L.S.

FORM OF WARRANTY DEED

used in Iowa, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island and Vermont.

Know all Men by these Presents, That I, , of
 , in the state of , in consideration of
 dollars to me paid by
of , the receipt whereof is hereby acknowledged, do
hereby give, grant, bargain, sell and convey unto the said
 all that parcel of land situate in said,
and bounded as follows, etc.

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said , his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors, and administrators shall warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid I, , of
 , wife of the said , do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, we, the said and ,
hereunto set our hands and seals this . day of ,

FORM OF QUITCLAIM DEED

used in Iowa, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island and Vermont.

Know all Men by these Presents, That I _____, of _____, in the state of _____, in consideration of _____ dollars to me paid by _____ of _____, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever quitclaim unto the said _____ all that parcel of land situate in said _____, and bounded as follows, etc.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said _____ and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid I, _____, of _____, wife of the said _____, do hereby release unto the said grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In Witness Whereof, we, the said _____ and _____, hereunto set our hands and seals this _____ day of _____, 19 _____.

NOTICE BY TENANT TO LANDLORD

In Exercise of the Power reserved to me by a certain indenture of lease bearing date on the _____ day of _____, and made between yourself of the one part and myself of the other part, and whereby the premises therein demised to me for the term of twenty-one years from the _____ day of _____, 19 _____, are determinable as therein mentioned, I hereby give you notice that it is my intention to determine the said lease at the expiration of the first _____ years thereof, which will expire on the _____ day of _____ next, on which day I shall quit and deliver up to you the possession of the buildings and lands therein comprised.

FARM LEASE

This Indenture, *Made the*

day of *A. D. one thousand nine hundred and*

Between

(hereinafter called the Lessor) of the one part,

and

(hereinafter called the Lessee) of the other part,

Witnesseth. *That the said Lessor for and in consideration of the rents, covenants and agreements hereinafter mentioned, on the part of the Lessee , to be paid, kept and performed, doth by these presents, demise, lease and to farm let, unto the said Lessee , All that*

To have and to hold *the same unto the said Lessee for the term of* *commencing on the* *day of*
A. D. 19 *at the* *rent or sum of*
to be paid as follows:

And *the said Lessee as security for the payment of the rent falling due under this lease, hereby grants, bargains and sells to the said Lessor , all* *stock, farming utensils and machinery, crops and other personal property upon said demised premises during said term, and should default be made in the payment of any part of said rent for* *days after any payment thereof shall fall due, the said Lessor may, at his option, take possession of said stock, farming utensils, machinery, crops and other personal property, and sell the same at public sale on five days' notice, the said Lessee hereby waiving the benefit of all laws exempting the same, or any part thereof, from levy or sale to satisfy the said rent and costs; and should any of the said goods and property be removed from said premises, the Lessor may follow the same and levy upon and take possession wherever found, at any time within ninety days after such removal, and proceed to sell the same as aforesaid, to satisfy any or all rent that may be in arrear, together with necessary costs and expenses.*

And *the said Lessee shall not and will not at any time or times during said term sell, remove, give away or otherwise dispose of any straw, fodder or manure*

which may be upon the premises at the commencement of said term, or which shall grow or be grown, produced or made thereon during the continuance thereof, but the whole of said straw, fodder and manure

shall be left upon the said premises or employed in the improvement or cultivation thereof:

It is further agreed that the Lessee shall plow, break up and farm the following fields, to wit:

And *the Lessee further agrees to farm and till the said demised premises and manage the same in a good and husbandlike manner;*

to keep in good repair all the buildings and fences thereon, keep from wilful or negligent hurt all fruit, ornamental or other trees or plants on said premises, destroy all noxious weeds from time to time, and at the end of said term deliver up the same in like good order and conditions as they now are in, reasonable wear and tear and damage by accidental fire or unavoidable accidents excepted. The said Lessee shall have free of charge so much firewood as may be necessary for family use, the same to be taken from such fallen timber as may be suitable for that purpose. If sufficient fallen timber cannot be found, he shall cut down only such trees as the Lessor may point out; and such other timber as may be required for repairing or renewing fences or buildings shall only be cut after the Lessor shall have consented to and selected the same.

The said Lessee shall not do or commit or willingly suffer to be done or committed, any act, matter or thing whereby or in consequence whereof the fire insurance on the demised premises shall become avoided or suspended; nor shall he sublet the demised premises, or any part thereof, for the whole or any part of the term aforesaid, without the written consent of the Lessor first had and obtained. All covenants and agreements herein contained or agreed to be kept or performed by either of the said parties hereto, shall extend to the heirs, executors, administrators, successors and assigns of such party.

In Witness Whereof the said parties have hereunto set their hands and seals the day and year first above written.

Sealed and Delibered
IN THE PRESENCE OF US:

L.S.

L.S.

L.S.

LANDLORD'S QUIT NOTICE

You are hereby notified to quit the premises situate

which I have leased to you, reserving rent—"or pay and satisfy the rent due and in arrear," being \$ which amount was due on the day of 190 and is hereby demanded,—(you having neglected or refused to pay the amount so reserved, as often as the same has grown due, according to the terms of our contract—and there being no goods on the premises adequate to pay the rent so reserved, except such articles as are exempt from levy and sale by the laws of this Commonwealth) within days from the date hereof, or I shall proceed against you as the law directs.

Yours, etc

To

lord or constable may enter and make a levy or distraint. In the case of a dwelling house no right is given to raise a latch on a closed door, as this act, in the eyes of the law, is as much a breaking as would result from forcing a door bolted with iron.

The landlord or constable upon entering the premises makes a seizure of such goods and chattels as are liable for rent, of which an inventory is made. No actual seizure is required, it being sufficient if notice is given of the claim for rent, and the tenant forbidden to remove the same from the premises until the rent is paid.

If, after goods have been distrained, they are removed from the premises, the guilty party is liable to pay treble damages and costs of suit to the injured party. It is prudent to place a watchman in charge of goods distrained upon to prevent their removal. A landlord should also exercise care not to distrain on more goods than are necessary to satisfy his claim for rent and costs, but he is not liable for a slight excess or error in judgment.

Tender of Rent.

If a tenant, upon receiving a notice of the distress with a copy of the inventory, decides to pay his rent, and stop further proceedings, he must observe the law regulating a legal tender of money. The tenant must produce and offer the entire amount due in money, either gold coin or legal tender notes, to the landlord or his agent authorized to receive payment of the same. It should be borne in mind that bank notes are not a good legal tender, and silver coins less than a dollar are not legal tender for debts in excess of ten dollars. United States gold coins and notes are legal tender. The offer must be without qualification or condition. These observations should be followed to make legal a tender of money under any circumstances.

The tenant's goods should not be sold *en masse*, but separately or in parcels, so as to obtain the best price in order to protect the tenant against a sacrifice of values.

We referred above to the provisions of the exemption law, which exempted from sale on an execution of any kind the debtor's goods or property to the extent of three hundred dollars. This beneficent statute cannot be claimed by a sub-tenant who occupies part of the premises in violation of a lease not to sub-let without the consent of the landlord. It is also very important to note that a corporation or partnership cannot claim the benefit of the exemption law, as this is altogether a personal privilege. A

claim for exemption should be made before the sale, and preferably before the advertisement of the sale is posted.

Distrain of Goods Fraudulently Removed.

Sometimes a tenant whose rent is in arrears will remove without notice to his landlord. The law provides that should a tenant fraudulently remove his goods from the leased premises with intent to prevent a distraint, the landlord may within thirty days after the goods are removed, follow the same and take and seize such goods wherever they may be found, as a distress for rent in arrears, provided that the goods have not been sold *bona fide* and for a valuable consideration before they are taken by the landlord. If the goods are removed in the night time, this fact is in itself sufficient evidence of fraud. Should a tenant merely remove his goods in the day time, his rent being in arrear, this would not be fraudulent, as a tenant is not bound to give notice to the landlord that he is going to remove his goods.

Any goods of a stranger upon the leased premises may be removed any time before levy, and a landlord has no legal right to follow a stranger's goods.

Apportionment of Rent.

If a tenant before the expiration of his term, and also before any rent is in arrear, remove his goods for the purpose of defrauding his landlord of the right of distress, the landlord may, by the act of March 25, 1825 (applicable only to Philadelphia and Pittsburg), have his rent apportioned to the time of such removal, and follow and take the goods as a distress within thirty days from such removal. To avail himself of this right, the landlord must make oath or affirmation that he believes the goods were carried away for the purpose of defrauding him.

Besides the various remedies which we have already indicated, a landlord may sue his tenant for non-payment of rent in an ordinary action of assumpsit. If the amount of rent claimed is less than one hundred dollars, suit is brought before a Magistrate or Justice of the Peace. The law of Pennsylvania gives magistrates in cities of the first class jurisdiction in cases of contract where the amount demanded does not exceed one hundred dollars. In other portions of the State the jurisdictional amount of a Justice of the Peace is three hundred dollars.

Recovery of Rent in Miscellaneous Cases.

Upon the death of a tenant the landlord's right to distrain ceases. Rent for the period of one year is included in the second class of debts to be first paid out of a decedent's estate. A landlord's claim for rent is not required to be paid until the expiration of a year after letters of administration have been taken out.

Upon the bankruptcy of a tenant, a landlord is permitted to prove a claim for such rent as was actually due at the date the petition in bankruptcy was filed.

Tenant's Liability for Taxes.

The act of April 19, 1883, provides that in cities of the first class, the Receiver of Taxes may distrain and levy upon and sell any goods, chattels or personal property found on any premises on which taxes are delinquent. When the goods, chattels or personal property of any tenant is levied upon under the above act, the Receiver of Taxes is authorized to proceed with due diligence to collect the same from said tenant to the amount of rent then payable to the owner of the premises. The amount collected by said Receiver of Taxes shall be a lawful deduction from the rent due, and in the event of the refusal of any landlord to allow of said deduction to said tenant on account of rent, then it shall be the duty of the City Solicitor to defend the said tenant in any action brought by the landlord for the recovery of rent due from said tenant. It is further provided by the above act that a tenant shall in no case be liable to pay the said taxes, costs and charges until the rent shall have become due and payable, and the Receiver of Taxes cannot follow the tenant's goods if same are removed to a different address.

Mechanics' Liens.

The property of a landlord is not liable to liens for repairs, alterations or additions made by a tenant, without the written consent of the landlord or his agent, and notice must be given the landlord or his agent at the time materials are furnished, or work done, of the intention to file a lien.

Surrender.

If a tenant, before the expiration of his lease, decides to remove, and upon paying rent to date of removal notifies his landlord of his intention and hands over the keys to the prem-

ises, the landlord may accept the surrender, and if he do so, he cannot thereafter maintain any claim for rent for the balance of the term. It has been held that if a landlord or his agent accept the keys to the leased premises without comment, such silence is an acquiescence in the surrender. If a tenant surrenders possession of the premises to the landlord, the latter must declare his intention of holding the tenant responsible for future rent, if such is his purpose.

Recovery of Possession at Expiration of Term.

If premises have been leased for a fixed or definite term, and the tenant holds over after the expiration thereof, a landlord may, under the act of March 21, 1772, give the tenant three months' notice to vacate. If the tenant should refuse to deliver possession the landlord may bring suit, and upon proving his ownership of the premises, the leasing thereof, and that the tenant refuses to deliver possession after three months' notice, may obtain judgment upon which a warrant will issue directing a constable to deliver possession of the premises to the landlord. Notice to remove before the expiration of the term is unnecessary under this act. But if the premises have been leased from year to year or at will, a landlord to recover possession must proceed under the provisions of the act of December 14, 1863, which requires the landlord to give the tenant three months' notice to vacate at the expiration of the lease. The notice to quit must be given three months' before the end of the term, and must be to quit at the termination of the lease, and not at some other date.

If a lease is from month to month, thirty days' notice to vacate must be given before proceedings may be begun to dispossess the tenant.

Unless the lease requires it, a tenant is not bound to give any notice that he intends to remove, but practically every lease requires that the tenant give notice. A verbal notice by either party is sufficient, but it is advisable to give the notice in writing.

Proceedings to Recover Possession in Philadelphia on a Lost Lease.

If a landlord desires to obtain possession of leased premises, but has lost his copy of the lease and cannot recall when the term began or should conclude, he may give notice in writing to the tenant that he has lost his lease and require the tenant within thirty days from the time of service of such notice to furnish

him in writing with the date at which the tenancy began. If the tenant refuses to give this information the landlord may then give the tenant three months' notice to quit the premises occupied by him, and may proceed thereafter in the same manner as is provided in case of the usual notice to quit at the end of the term, as heretofore indicated. If the tenant shall make affidavit within the said thirty days that he is unable to comply with the landlord's requirement, the latter must give the tenant six months' notice to remove. This right to recover possession where the lease has been lost, which is conferred by the act of February 28, 1865, is limited in application to the city of Philadelphia.

Any interference with the tenant's beneficial enjoyment of the demised premises constitutes an eviction at law on the part of the landlord, and the tenant would thereafter be relieved from liability to pay rent. So zealously does the law guard a tenant's rights in this regard that even when the premises have been destroyed by fire an entry by the landlord for the purpose of rebuilding without the consent of the tenant will amount to an eviction. An eviction will not discharge rent due prior to such eviction, but only that accruing subsequent thereto. If, however, a tenant, subsequent to an eviction, continues to pay rent without setting up the eviction as a defense, such fact would be construed as a waiver of his rights.

Forcible Entry and Detainer.

The statute regulating forcible entry and detainer has a very important place in considering the rights and remedies of landlords and tenants. The act of March 31, 1860, provides that "if any person shall, with violence and a strong hand, enter upon or into any lands or buildings, either by breaking open doors, windows or other parts of the house, or by any kind of violence or other circumstances of terror, or if any person, after entering peaceably, shall turn out by force or by threats or menacing conduct the party in possession, every person so offending shall be guilty of a forcible entry, and on conviction shall be sentenced to pay a fine not exceeding five hundred dollars or undergo an imprisonment not exceeding one year, or both or either at the discretion of the Court, and to make restitution of the lands and tenements entered as aforesaid." To constitute the crime of a forcible entry the force used must exceed the force of a mere trespass; the circumstances must be such as would excite terror and result in a breach of the peace, such as violence offered to the person, having unusual offensive weapons, of being attended by a multitude of people.

A landlord has no right to expel even a tenant at will by force, and he cannot enter with a strong hand after the expiration of the term to dispossess a tenant with force. He is not permitted to assert his title with violence.

As a protection to the landlord, the law goes further and says: "If any person shall, by force and with a strong hand, or by menaces or threats, unlawfully hold and keep possession of any lands or tenements, whether the possession of the same were obtained peaceably or otherwise, such person shall be guilty of forcible detainer, and upon conviction thereof shall be sentenced to pay a fine not exceeding five hundred dollars or to undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the Court, and to make restitution of the lands and tenements unlawfully detained as aforesaid; provided that no person shall be guilty of forcible detainer if such person, by himself, or by those under whom he claims, has been in peaceable possession for three years next immediately preceding such alleged forcible detention."

The same circumstances of violence pointed out in connection with forcible entry are applicable to forcible detainer. In other words, the landlord in taking possession, and the tenant in keeping possession, must not be guilty of acts constituting a breach of the peace, as any acts of violence would subject the guilty party to prosecution under the above Act of Assembly.

It must be borne in mind that a tenant who holds over after the expiration of his term is not a trespasser, but he has a clear right to maintain possession of the demised premises until he receives notice to quit.

Negligence as to Leased Property.

A builder who erects a building for the purpose of renting the same is required to exercise care and skill in its erection, regard being had to the purpose for which it is designed. Should a landlord, for example, lease a house unfitted for the purpose of a tenant, as for heavy storage, he will be liable for damages, unless he forbid such use in the lease.

If a landlord has taken due precaution to erect and maintain a safe building, he is not liable for defects of which he had no knowledge or reason to believe existed.

If the premises are in good repair when rented, the tenant is liable to any one injured in or about the premises as a result of the tenant's failure to repair. To illustrate, if there is an opening in the sidewalk of leased premises, which opening is

covered by a grate, one of the bars of which has been broken during the term, the tenant, and not the landlord, is liable for injuries sustained by a person falling down said opening. If a tenant should allow the leased premises to go to ruin on account of failure to make tenantable repairs, or if he should wilfully injure the premises, he is guilty of waste, and the landlord may apply to the Court to restrain the tenant from committing waste.

Liability to Repair Sidewalk.

The owner of property along a street is required to keep the sidewalk in front of his property in proper repair, and upon failure to do so, such owner would be liable for any injury resulting therefrom.

Mining Leases.

In view of the extensive mineral interests of Pennsylvania, the subject of leases could not properly be concluded without a few brief observations concerning leases of mining property.

In Pennsylvania, in the majority of instances, land is leased for the purpose of obtaining coal, oil, gas, etc., therefrom, the lessee being required to do the mining or drilling, as the case may be, and to pay to the landlord, in the nature of rent, a certain proportion of the products taken from the land, called royalties. It is customary to make such leases for a term of years, or as long as minerals may be taken from the land in paying quantities. A right to dig for minerals is distinct from a right to the soil. It is very common in every part of the State where coal and iron is to be found to give rights to mine below the surface of the ground separated from a right to the surface. Such a grant confers in reality a mere license to take and appropriate the minerals beneath the surface and no property vests in the lessee until they are taken and appropriated by him.

It is well-settled law that a lease giving the right to take out all the coal beneath a certain surface also confers the right to make all necessary openings to reach the coal. In other words, when anything is granted all the means to obtain it are granted.

The grant of oil and gas privileges cannot be of oil and gas in place, as in the case of a grant of coal, iron and other minerals.

When land is leased for the purpose of drilling and operating for oil and gas, the lessee's right is in the nature of an

easement of entry and examination, with a right of possession arising where the particular place of operation is selected for egress, storage, transportation, etc., during the continuance of operations. The actual subject of possession to which an oil lessee is entitled is in the oil and gas contained in the land. Where there is a lease of the exclusive right to operate for oil for the term of ten years, such a grant is not a sale of the oil, but only the exclusive right to operate for it during a definite term.

If the consideration of a mining lease is the payment on the part of the lessee of a minimum royalty for a limited number of years the fact that the coal is exhausted sooner than was anticipated will not relieve the lessee from liability to pay the minimum royalty agreed upon.

A party opening a coal mine in the ordinary and usual manner may, upon his own lands, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is located, even though the quantity of water is increased thereby and the quality so affected as to render it totally unfit for domestic purpose by the lower riparian owners.

A manufacturer of coke from coal purchased by him from another mine owner must be careful that the smoke and vapors emitted from his ovens shall not substantially injure the crops and soil of an adjoining farm, for which injury he would be liable in damages.

Directions in Renting Property.

In concluding the subject of Landlord and Tenant, it will be instructive to consider a few precautions which should be carefully observed in leasing a property.

In the first place the premises should be thoroughly examined. It seems unnecessary to call attention to this fact, but in a leading Pennsylvania case a tenant had failed to notice the defective construction of the drains, and having been advised by his physician that it would be dangerous to remain on the premises, he removed therefrom. It was held in this case that the defects in the drainage system were no defense to a claim for rent.

In the absence of a provision in the lease that the landlord shall make repairs, there is no implied covenant that the landlord warrants the leased premises to be tenantable. There is a popular impression that a landlord is bound to conform to what is a general practice of landlords, in repairing and keeping the rented

property in good condition. This impression is erroneous, and trouble and expense will be saved by clearly setting forth in a lease the mutual obligations of a landlord and tenant concerning repairs.

Careful inquiry should be made of the landlord as to everything a tenant desires to know about the premises. A tenant desiring to lease a certain property for the purpose of conducting a millinery store asked the landlord about the condition of the bulk show windows and was told by the landlord that they had new roofs and were in perfect condition. As a matter of fact, the roofs of these windows were not new and were in very bad condition. The landlord in this case was held liable for deceit.

In large cities there are plans kept showing streets opened and unopened, and where a lease is contemplated for a long term, of property located in an unimproved neighborhood, and the lessee contemplates erecting improvements, the lessee should first ascertain whether or not any unopened streets on the city plan are made to run through the premises, and what effect a subsequent opening of such street would have upon any such improvements.

If a tenant intends expending a considerable sum of money for improvements he should carefully examine into the title of his prospective landlord. Of course, the law implies a covenant on the part of the landlord that the tenant shall have undisturbed possession of the demised premises during the term of the lease, but this implied covenant may be a very insufficient protection if the landlord is financially irresponsible.

A tenant should also ascertain whether there are any charges or encumbrances, such as judgments, municipal claims or mortgages unsatisfied, which might result in a sheriff's sale of the premises and the destruction of the lease. In case of a sheriff's sale upon a prior encumbrance, the purchaser can give notice for possession and break the lease.

A tenant desiring to place signs on the walls of leased premises to advertise his business should provide for such right in his lease, otherwise this right could be denied him. If a tenant rents a floor he rents the inside and not the outside, and has no right to put out a sign in front unless the landlord consents.

Similarly if it is desired to exhibit a show case at the street entrance to a business property, this privilege should be stipulated in the lease. In a certain case the first floor of a property had been rented to a merchant tailor, while the second floor

was rented to a photographer, who placed a show case upon the pavement beside the merchant tailor's door. The Court held that all that any of the tenants had was an uninterrupted passageway in common with the public.

Protection in Case of Fire.

If a tenant rents only a floor of a building and such floor shall be wholly destroyed by fire or other casualty without his fault, the lease would thereupon terminate and the payment of rent cease. This, however, is not the case where a tenant rents the entire property, as previously pointed out. It should be provided in the lease that should the premises be wholly destroyed by fire, without the fault or neglect of the tenant or of his agents and servants, the lease shall become void. In such event, all back rent and the current rent apportioned up to the date of the fire may be recovered under the terms of the lease.

If the premises are only partially destroyed by fire, it is well to have a provision in the lease that the landlord shall repair the same and the tenant shall not be liable for rent during the period he is required to vacate the premises while the repairs are being made. If the tenant during repairs is deprived of only part of the premises he should be allowed a just proportion of the rent for the parts not occupied by him during the time required for repairing.

Protection of Fixtures in Cases of Renewed Leases.

A tenant is required at the expiration of his lease to remove his fixtures, and upon his failure to do so, they become the property of the landlord. If, at the expiration of his term, a tenant renews his lease and acquires a fresh interest in the premises, he should take care to reserve the right to remove such fixtures at the end of the extended term.

Miscellaneous Precautions.

The Act of Assembly only gives the landlord the right to follow and distrain upon goods within thirty days in cases of clandestine removal, and hence, as an extra security to the landlord, a clause should be inserted in the lease that in case the tenant shall remove his goods from the premises, whether clandestinely or otherwise, they may be distrained upon, wherever found, within thirty days after removal.

If a party desires to lease part of demised premises as

a sub-tenant, he should first obtain the written consent of the paramount landlord and secure the benefit of the exemption law.

The owner of property who has placed fire insurance thereon should, in leasing the same, be careful to forbid such use of the premises by a tenant as would affect the insurance. For example, a property, which was originally occupied by a tenant as a shoe store, was changed by the tenant into a dry goods, hardware and grocery store, in which a keg of powder was placed. The storage of gunpowder and the occupation of a grocer were prohibited by the fire insurance policy. Fire broke out in the grocery store and the powder exploded. In a suit brought by the landlord to recover the insurance, the Court held that the fire insurance company was not liable, and that it was immaterial that the landlord was ignorant of the use of the premises made by the tenant. Before leasing property the landlord should see that the business of the proposed tenant is not prohibited by the policy of fire insurance.

It will be recalled that our digression into the subject of landlord and tenant was undertaken in connection with our study of rents, one of the three classes of incorporeal hereditaments of present importance in Pennsylvania, to wit, commons, easements and rents. We will revert to the subject of real estate proper, and shall consider the estates and interests which may be had in "Things Real," with reference to (1) quantity, (2) time of enjoyment and (3) number and connection of the tenants.

An estate we have defined as that interest which a tenant has in land, tenements and hereditaments, and we shall consider estates with reference to their quantity, time of enjoyment and the number and connection of the tenants.

By the quantity of an estate, we mean the time the interest of a man in lands, tenements and hereditaments shall exist; that is, whether the interest shall be held by a man during his life and thereafter pass to his heirs, or whether such interest shall be limited to a term of years. Estates, therefore, are divided into (1) estates of freehold and (2) estates less than freehold.

The common division of freehold estates are into those (1) of inheritance and (2) those not of inheritance, such as an estate for life only. Again, freehold estates of inheritance are divided into (1) inheritance absolute and (2) inheritance limited. A freehold estate of inheritance absolute is what is known as an estate in fee simple, with which every real estate man should be familiar. A tenant in fee simple is one who has the

right to hold lands, tenements and hereditaments for himself and his heirs forever. The word "fee," like the word "freehold," has assumed a secondary meaning, so that the technical meaning of the word in modern conveyancing is inheritance. We note, therefore, that by an estate in fee is meant an estate of inheritance. Now a fee may be either a fee simple or a fee-tail. A fee simple is where the inheritance is to descend to the heirs of the tenant without condition or qualification. The word simple is usually dropped, as an estate in fee is ordinarily understood to be an estate in fee simple.

Originally the word "heirs" was necessary to create a fee simple by conveyance. A deed to a man to endure as long as the waters of the Delaware should run was held to pass a life estate only, but in recent years this rule has been relaxed, and an estate of inheritance frequently passes without the use of the word heirs, although it is customary to use the word. In a deed to a corporation, instead of the word heirs, the words successors and assigns should be used to indicate the quantity of estate conveyed. A conveyance to a man and his heirs vests an absolute title in the holder of the lands. The heirs of said donee have no estate because a man has no heirs until he is dead. Hence, if John Doe is alive, a conveyance to the heirs of John Doe would be void on the ground of uncertainty.

The principal feature of an estate in fee simple is the power of the owner to alien or transfer the same.

There is a certain class of persons who, even though taking an estate in fee simple, cannot convey it, such as infants, lunatics and habitual drunkards, but this is due to personal disability. Furthermore, a married woman cannot convey any real estate unless her husband joins in the deed. Corporations are forbidden to hold lands unless specifically authorized to do so by their charter. In Pennsylvania an alien may, by statute, take and hold by devise or descent any quantity of land, and may purchase and hold not exceeding 5,000 acres.

If a man is the owner of land in fee simple he may do with it what he pleases, subject to one or two public and private limitations. He must pay such taxes as are duly assessed thereon, submit to police regulations, and is subject to the right of the State to take his land for public uses under the doctrine of eminent domain, of which more hereafter.

Moreover, an owner of land in fee simple must so use his property as not to injure that of another. No duty is owing to a trespasser on his land, and if one enters without the permission

of the owner and is injured he could not recover damages from the owner.

Having considered the nature of absolute estates of inheritance or estates in fee simple, which is the largest estate a man may enjoy in things real, we will direct our inquiry next into limited estates of inheritance, which are of two kinds—(1) qualified, base or determinable fees, and (2) conditional fees, afterward known as fees-tail.

A qualified fee is one subject to a qualification and terminates when the qualification is at an end. Such an estate may continue indefinitely, but is liable to be determined by some act or event specified in the grant. To borrow an old illustration, an estate may be given to a man and his heirs so long as St. Paul's Church shall stand. Such is a qualified fee, because the duration of the estate depends upon some circumstance which qualifies it. The owner of a base or qualified fee has the same rights and privileges as the owner of a fee simple, but he cannot transfer any greater estate than he himself enjoys.

Conditional Fees (Fees-Tail).

Passing from freehold estates of inheritance, both absolute and limited, we come to freehold estates not of inheritance, such as life estates, which are of two kinds, (1) Conventional, or those created by the act of the parties; and (2) those which are created by the operation of law.

Ordinarily the words used in conveying a life estate are "for and during the term of his natural life" or "for life."

Sometimes an estate is granted during the life of a third person, as, for example, a grant of land to John Doe as long as Richard Roe lives.

A life estate may be qualified or determinable the same as determinable or qualified fees. To illustrate, suppose an estate is granted to Jane Doe "as long as she remains unmarried," or as long as she resides in a certain place. Such an estate is known as a qualified or determinable life estate, for, although it may exist as long as the person lives, it may, nevertheless, be ended sooner upon the happening of an event or the doing of an act.

We must in this connection carefully distinguish a life estate from an estate for years. If an estate is granted to John Doe for the period of one hundred years, the right granted is not a life estate, but a term which is but an inferior chattel interest in lands.

In view of the fact that there are others who have rights in the land after him, a tenant for life is under certain restrictions regarding his possession of the land. A life tenant is prohibited from committing waste, which is any injury done to real property by one having lawful possession thereof, but only having a limited estate therein. There are two kinds of waste, (1) Voluntary, which is an act of commission, and (2) Permissive, which results from omission or neglect. A tenant for life of land is required to farm it in a husband-like manner so as not to cause it to deteriorate in value to such an extent that it would be unfitted for the purpose for which it was originally intended when the life tenant came into possession.

Concerning the right of a tenant for life cutting down the timber on his land, circumstances must govern every particular case. In some sections of Pennsylvania, the cutting down of timber increases the value of the tract, while in other parts it decreases the value, in which latter case waste would be committed in so doing.

The law will not permit a tenant for life to open a mine which may happen to be on his property, but if a mine has been opened, a tenant for life may operate such mine for profit until the mineral is exhausted without committing waste. A tenant for life cannot, however, go through an old opening to reach a new vein, but if a mine has been already opened a tenant for life upon taking possession may make a new opening to reach all the mineral in that particular vein.

A tenant for life is liable in damages for failure to repair houses and fences and keep the property in good condition. A life tenant is required to pay interest on mortgages and all taxes assessed against the land, but is not bound to pay off the principal of any encumbrance. In case it is necessary to pay off an encumbrance, a tenant for life may be compelled to contribute in proportion to the benefit he will derive by not having to meet the annual payments of interest during his lifetime.

Life Estates Created by Operation of Law.

A life estate may be created by operation of law in four different ways, only two of which are of sufficient importance to discuss in a course of this character, i. e., a husband's curtesy and wife's dower.

A husband's curtesy is that interest which a man has in the lands in which his wife has an estate of inheritance. At common

law a freehold estate in his wife's lands vested in the husband upon marriage, which lasted during their joint lives.

By the act of April 8, 1833, regulating the descent of property in the case of a person dying intestate (without leaving a will), it is provided that if a married woman should die intestate, her real estate shall descend as thereafter provided, "saving to the husband his right as tenant by the curtesy which shall take place, although there be no issue of the marriage in all cases where the issue, if any, would have inherited."

An absolute divorce destroys the right of curtesy, but a limited divorce will not. It is also provided by statute that if a husband deserts his wife or refuses to provide for her for one year or more, he loses his claim to curtesy in his wife's real estate.

Dower.

Dower at common law is a life estate which the law gives to the wife after the death of her husband. Such dower interest is limited to one-third part of the real estate which her husband was possessed of at any time during the marriage for an estate of inheritance.

In Pennsylvania, to-day, common law dower can only exist in cases where a married man has conveyed real estate during his lifetime without his wife joining in the deed.

Statutory Dower.

The Legislature of Pennsylvania has made certain provisions for widows in lieu of dower. The statute provides that if a man dies leaving a widow and issue, the widow shall be entitled to one-third of his real estate for the period of her life and to one-third of his personal estate absolutely. If a man should die leaving a widow, but no issue, the law gives the widow one-half of his real estate for life and one-half of his personal estate absolutely. It is expressly enacted that this provision for the widow shall be "in lieu and full satisfaction of her common law dower." If a husband makes a devise or bequest to his wife of any portion of his estate, the Pennsylvania Statute of Wills provides that the same shall be deemed and taken to be in lieu and bar of her dower in the estate of her husband, unless the husband shall in his will declare otherwise. A widow could, therefore, either accept the provision made for her by her husband's will, or she could elect to take her dower interest at com-

mon law. It will be readily observed that under such conditions a husband, by making a will, could cut his wife out of all interest in his personal estate, for if she took against the will, her common law dower would vest in her only an interest in land. The act of April 11, 1848, commonly known as the Married Woman's Act, corrected this defect in the law by providing that a widow, in case she elected not to take under her husband's will, might take her choice, either of accepting the provision made for her by the will or she could elect to take her share of her husband's personal estate in accordance with the provision of the intestate law.

Subsequent to the above act dower could be claimed under two circumstances only—(1) where the husband had made a will which the widow refused to take under, and (2) where the husband had conveyed lands during his lifetime, without the wife joining in the deed. But by the act of April 20, 1869, a wife's dower was limited to the latter circumstance, the act providing that "in case any person has died, or shall hereafter die, leaving a widow and a last will and testament, and such widow shall elect not to take under the will, in lieu of dower at common law, as heretofore, she shall be entitled to such interest in the real estate of her deceased husband as the widows of decedents dying intestate are entitled to under the existing laws of this Commonwealth."

It was pointed out before that the owner of land owned not only the surface of the ground, but all above and beneath indefinitely. Such is known as land natural. It is an old rule of the common law that everything affixed to land becomes part of the land, as, for example, trees, fences, houses, etc. Conversely, whatever is separated from land loses its character as land. Clay and limestone are land, but dug up and made in the form of bricks and lime become chattels.

The principal exception to the above-stated rule is furnished in the case of fixtures. A chattel attached to land is called a fixture, and it is very important to know under what circumstances a fixture is to be regarded as a part of land and when as personal property.

If the old maxim of the law to the effect that everything affixed to land became land were literally applied, every chattel or fixture attached to real estate would be transformed into realty. Such, however, is not the case. As was said by a Justice of the Supreme Court of Pennsylvania, in a leading case, whether or not a fixture is to be regarded as real estate or

personal property depends more upon the intention of the party who constructed the fixture than upon mere physical attachment. In determining this question the fact to be established is whether it was intended to make the chattel a permanent part of the freehold, or merely a temporary arrangement.

The intention of the party making the annexation is presumed from the nature of the article annexed, the relation of the party making the annexation, the manner of annexation, and the use of it.

It has been held that gas fixtures and heaters are not fixtures to be included as part of the real estate to which they are attached. Gas fittings, on the other hand, are fixtures which are part of the real estate. As a general rule, the machinery in a mill or factory is real estate, and passes upon a sale of the factory.

Ordinarily the question whether or not a certain annexation is a fixture and whether a right to remove the same exists, arises upon a change of title of possession of property.

Consequently the parties between whom this question of fixtures may arise are (1) heirs and executors, (2) vendors and vendee, (3) mortgagor and mortgagee, (4) landlord and tenant, and (5) life tenant and remainderman, respectively.

A fixture to remain personal property must be of such a nature that it can be removed without doing permanent injury to the freehold.

Exceptions.

Certain exceptions exist in the case of a landlord and tenant, relative to the right to remove fixtures, which apply to cases of trade fixtures, or such articles as are necessary to carry on a particular trade; agricultural fixtures, and domestic fixtures, such as are attached to dwelling houses as a means of convenience and comfort. The above-named classes of fixtures may be removed by the tenant, but must be done in such a way as not to injure the freehold.

In this connection it is of interest to those living in farming districts to consider the law regarding emblements, which is the term applied to the right of a tenant to take and carry away corn or other crops produced by his labor, after his term has expired. The law of Pennsylvania provides that a tenant has the right and title to the "way-going" crop. That is, where a tenant whose term expires in the spring of the year, plants winter grain, which does not mature until the following summer, said tenant may

return after his term has expired to cut and take his crop away. The tenant may sell his way-going crop as personal property.

In the case of trees, which are not produced annually, they are part of the real estate and pass in a conveyance of land within the boundaries of which the entire trunk is located. An adjoining land owner may cut out the roots or cut off so much of the branches as projects over his land. However, the fruit of such extending branches belong to the owner of the trunk. A tree is common property if the trunk of the tree is on both sides of the boundary line. Trees, of course, become personal property as soon as they are cut down.

Land is divided both horizontally and perpendicularly. A man may sell the timber on his land to another and the minerals beneath it to a third, and reserve the surface for himself.

The perpendicular division of land involves the question of boundary lines, to which it will be instructive to advert briefly.

Boundaries to land may consist of imaginary lines upon the surface of the earth, or of material and visible objects, such as fences, roads and streams of water.

If a navigable river constitutes a boundary line, the title of the land-owner extends to low water mark, subject to the right of the public to use the stream for purposes of navigation.

In cases where land is bounded by an unnavigable stream the title of the owner extends to the middle of the stream. When an unnavigable stream changes its channel the title of the adjacent land-owners follows the change, but where the change is sudden the ownership remains according to the former bounds. If a stream should change its channel and make an entirely new one in the land of the owner on one side, he will become owner of the whole river, so far as it is inclosed by his land.

In connection with the subject of boundary lines, let us consider briefly the law applicable to party walls. A land owner about to construct a building thereon may place the dividing wall between him and the adjacent land-owner equally upon the land of each. Such a wall will be a party wall if any part of it is over the boundary line. Unless a wall, foundation and all be wholly within the boundary line of the builder, it will be a party wall subject to the restrictions regulating the same. Originally the right of the builder of a party wall to be compensated by the adjoining land-owner for the use of so much of the wall as was erected on his land, was held to be a right to a sum of money and therefore personalty, and would not pass to a purchaser on a sale of the building of which the party wall formed part.

Subsequently an act was passed in Pennsylvania providing that the right to the party wall or to compensation for it should pass to the purchaser on a conveyance of the building, thus making this right real estate.

Hereditaments.

The term hereditament which is employed in every deed to real estate, should be clearly understood. Hereditaments, including whatever rights may be inherited, are divided into corporeal hereditaments and incorporeal hereditaments. Corporeal hereditaments consist of "land, structures thereon and fixtures thereto," being rights to things visible to the senses. We have emphasized the significance of the term land and indicated the manner in which it is divided. Let us next turn our attention to incorporeal hereditaments which have been defined to be "rights issuing out of, annexed to or exercisable within land." Incorporeal hereditaments are principally of ten sorts: Advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents. Passing over those which are obsolete, we will limit our inquiry to those of present day importance to a real estate man, namely, commons, ways or easements, and rents.

A right of common is that estate which one man, or many men, may have in the land of another. In reality it is a special privilege annexed to the land and passes by the conveyance of the land to which it is attached.

Rights of common are of four kinds: A common of pasture is the right to pasture cattle on the lands of another. A common of piscary is the right given to fish in the streams located on another man's land. A common of turbary is the right to take soil or mine coal on another's land. A common of estovers is the right to take timber from the land owned by another. Such rights are incorporeal hereditaments, that is such rights as may be inherited, although intangible. Originally these rights were established by long continued usage or custom, but later by special grant in a deed. Such rights of common as now exist rest upon grant, either express or implied. Many cities and towns have large tracts of land appropriated to public use known as town squares or "commons." The original owners of such land cannot reclaim the same after it has been accepted by the public.

An easement has been defined to be "a liberty, privilege or

advantage in land, without profit, existing distinct from an ownership in the soil." A right of common confers the privilege of consuming land so as to receive profit therefrom. The distinguishing feature of an easement is that it gives the right to use lands without consuming it, i. e., with no profit. For example, a private roadway over the land of another is an easement. The most common illustrations of easements are (1) ways, (2) water-courses and other water rights, (3) lateral support, (4) drain and drip, (5) burial lots and pews, and (6) light and air.

A right of way is the right which confers on one or more persons or the public the privilege of passing over the land of another; where this right exists in favor of one or more individuals it is known as a private right of way; if the right is enjoyed by the public generally it is a public right of way. There are footways and carriageways, and a right of way granted to an individual will not authorize the passage of horses and cattle over the way. Streets, roads, navigable rivers and many private streams so declared by statute are public highways. Practically every creek in Pennsylvania sufficiently large to float logs has been declared a highway.

With the exception of navigable rivers, the title of the owner of land goes to the middle of all highways; the owner cannot, however, deprive the public of their right of way over said highway. The owner of land along a public river may build wharves upon it, subject to legislative control.

Ways of Necessity.

In cases where certain land is granted which is either entirely or partially surrounded by land of the grantor, and the grantee has no way out of his land except through the land of the grantor, the law presumes that a right of way was granted. Such are known as ways of necessity.

Public ways must be kept in repair by the township, borough or city, and any neglect of this duty renders the municipal corporation liable in damages to any one injured. A town or city is not liable for any accident due to the faulty condition of a foot pavement; the owner of the house which fronts on the pavement is liable in such case, but if the house is occupied by a tenant such tenant becomes liable.

The owner of the land through which a private right of way exists must keep such way in good condition.

During the middle ages the occupation of agriculture was

thought to be beneath the dignity of a gentleman. Consequently holders of freehold estates would allot certain portions of their lands at will, for which they received in return a portion of the crops which such land yielded. Gradually those who tilled the soil acquired an indefeasible right to the possession of the land for a definite period of time, which became in reality, an estate in the land, but which, of course, was less than a freehold.

There are four qualities of estates less than freehold: (1) estates for years; (2) tenant from year to year; (3) tenant at will, and (4) tenant at sufferance. As we have already discussed the first two classes in connection with the subject of landlord and tenant, it will only be necessary to distinguish the latter two classes of estates less than freehold.

Tenant at Will.

Although the Courts will always endeavor to so construe a lease as to give the tenant the benefit of a definite time, estates at will may and do exist, which arise in cases where one man leases lands to another to have and to hold at will of the lessor. The lessee is a mere tenant at will, for the landlord may dispossess him at any time he so desires.

In cases of a tenancy at will, the tenant is under no obligation to stay, and may leave when he pleases the same as a landlord may enter when he pleases. A tenant at will cannot assign his estate, and is bound not to commit any voluntary waste, but is not liable for permissive waste, as is the case of a tenant for years.

A tenant at sufferance is one who acquires possession of land lawfully and holds it afterward without any title. He has no right of possession nor any estate in the land, but, nevertheless, is not a trespasser.

Estates upon Condition.

Frequently an estate in lands is made to depend upon the happening or not happening of an uncertain condition. Such estates are known as estates upon condition, either implied or express. It is important to distinguish between a condition in a deed and a covenant. Where it is provided that an estate shall be either created, enlarged or destroyed upon the happening of a specified event, such a proviso is a condition, upon the breach of which the estate terminates. A covenant is an agreement under seal, and upon breach of a covenant the estate will not be

forfeited, the only remedy to the injured party being an action for damages on account of the breach.

Express conditions may be either precedent or subsequent. A condition precedent is such a condition as must be performed before any estate can vest. A condition subsequent, on the other hand, is one which upon its happening will defeat an estate already vested. Any condition, whether precedent or subsequent, is void if in restraint of trade, marriage or which is repugnant to the nature of the estate granted.

Mortgages.

Mortgages, although regarded by the law as personal property form one of the most important parts of the subject of real estate. A mortgage is a document transferring title to real estate to one loaning a certain sum of money to the owner thereof. In every mortgage there is contained a clause of defeasance, which provides that if the money is repaid within the time specified the property shall revert. The party giving the mortgage is called the mortgagor (the borrower), and the party who lends the money and takes a mortgage as security for its repayment is called the mortgagee. A mortgage may be for any quantity of estate, but in Pennsylvania are most commonly in fee simple. Every mortgage must, in view of the Statute of Frauds, be in writing. It is not necessary for a wife to join in a mortgage made by her husband, and if real estate mortgaged by a married man is sold under proceedings upon a mortgage the purchaser at sheriff's sale takes the same clear of the wife's dower, which would not be the case in an ordinary conveyance of land. Whenever land is conveyed as a security for the payment of money the law will regard the conveyance as a mortgage, and will not permit the creditor to take more than is justly due him, as the value of the property conveyed frequently exceeds the amount of the loan. A husband must join in his wife's mortgage.

Equity of Redemption.

Originally, according to the strict common law construction of conditions broken and the enforcement of forfeitures thereupon, great hardship was occasioned. If the mortgagor was unable on the day required, to pay the amount due, the estate vested absolutely in the mortgagee, and no subsequent tender or payment could operate to revest the title in the mortgagor. In equity a mortgage was regarded as a mere pledge for a debt,

and if the debt was paid together with a penalty for the delay, the debtor should have his property back again. Consequently equity recognized the mortgagor's right to redeem, and this right is known as the mortgagor's equity of redemption. This equity of redemption is, however, limited in point of time, as it would be obviously unjust to allow a mortgagor an unlimited option to redeem, and if this right is not taken advantage of within a reasonable time after default, the mortgagee may go into Court and foreclose the mortgagor's equity of redemption. The Court will then fix a new day on or before which the mortgagor must pay the debt, and if he failed to meet his obligation upon the new date thus specified his right to redeem was forever gone, and the estate forfeited to the mortgagee.

In making a mortgage the debt is usually set forth in a bond, which is executed together with the mortgage. The law of Pennsylvania is well settled as to debts which may be secured by mortgage. As against third persons, a valid mortgage can only be created for a debt having a definite existence at the time the mortgage is signed. A mortgage may be made to secure future advances to be made by third parties, but future advances are not secured unless the mortgagee is bound by his agreement to make them.

Upon the death of a mortgagor the property descends to his heirs, and if the mortgagee dies the mortgage held by him passes to his executors, as it is personal property. If a man buys a property "under and subject to a mortgage," he becomes liable to satisfy the same, as the property mortgaged is looked upon as a fund for the payment of the mortgage and one who has the fund ought to pay the debt.

A mortgage operates as a lien upon the mortgaged premises and may be prior or subsequent to other liens and mortgages. In Pennsylvania the words "first mortgage" means that the lien of the mortgage is prior to any other claim. By a "second mortgage" is meant one without intervening liens between it and the first.

Recording.

By statute, all mortgages are given priority according to the date of recording the same, without regard to the time of making or executing the same, except that in the case of a purchase money mortgage it shall maintain its priority if recorded within sixty days after date of execution.

In cities of the first class a purchase money mortgage should

be recorded immediately. The Recorder of Deeds is required to note on every mortgage the time when left for filing, and if two mortgages are given on the same day, the one left first at the Recorder of Deeds' office shall take priority.

Lien of a Mortgage.

A lien may be defined to be a right of priority in relation to two or more claims against the same subject matter. A man who holds a mortgage against a property and has duly recorded the same, has a right to have his mortgage satisfied out of a fund realized upon a sale of the mortgaged premises before any other creditor of the owner.

An act of March 22, 1887, preserves the lien of a mortgage by providing "that the prior lien of a mortgage should not be destroyed or in any wise affected by any judicial or other sale whatsoever, whether such sale shall be made by virtue or authority of any order or decree of any Orphans' Court or other Court, or of any writ of execution, or otherwise, howsoever, provided that the act should not apply to cases of mortgages upon unseated lands, or sales of the same for taxes. Municipal and State taxes have priority over every other claim against real estate.

Upon default of the mortgagor the mortgagee has three remedies, (1) he may bring an action of ejectment, which is very seldom done, owing to the nature of the proceeding, (2) he may enter up judgment on the bond and warrant of attorney accompanying the same, (3) or he may issue a *scire facias*, which is the customary way of foreclosing a mortgage in Pennsylvania.

Trust or Trust Estates.

A trust has been defined to be "the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another." A trust arises when real estate is conveyed to a party (in trust) to hold for and on behalf of another. The party having the legal title is called the "trustee" and the party for whom the land is held is called the "*cestui quē* trust." The idea of dividing the legal from the equitable title to land has become very common and affords various means of protection.

Estates of Future Enjoyment.

We have, therefore, in discussing the matter of estates, made references chiefly to those in actual possession.

A right to possess and enjoy real estate to vest in the future is known as an estate in expectancy, which class of estates is divided into (1) those created by the acts of the parties known as remainders, and (2) those arising upon construction of law, known as reversions.

A remainder is an estate limited to take effect and be enjoyed after another estate is determined, as, for example, a conveyance of land to John Doe for life, and after his death to Richard Roe in fee. In this illustration the original estate in fee is divided into two, a life estate in present enjoyment, and an estate in remainder in fee, to take effect after the life estate is determined.

There are two kinds of remainders, vested and contingent. A vested remainder is an estate in which the remainder vests immediately in a certain person, who becomes entitled to possession upon the determination of the original or particular estate. A contingent remainder is where either the person to whom, or the event upon which the future estate is to be enjoyed, is at present uncertain as, for example, an estate to Joe Doe for life, remainder to the oldest son of Richard Roe, while Richard Roe has no son. In this case the remainder does not immediately vest, because it could not take effect if the particular estate ended at any time before Richard Roe had a son. It is therefore contingent.

A reversion is an estate created by operation of law and is the residue of an estate left in the grantor to commence in possession after the termination of some particular estate granted by him.

In Pennsylvania all estates in expectancy may be conveyed by the owners, and all possible titles, legal or equitable, vested or contingent, in real estate, may be taken in execution and sold for the debts of the owner.

Passing from those estates in which but a single person has a present right of possession or enjoyment, there yet remains for us to consider cases in which two or more have a present right of possession of real estate, which cases may be divided into four classes: (1) Joint tenants, (2) tenants by entireties, (3) coparceners, and (4) tenants in common. With the exception of the third class, these joint interests in estates may be of

any quantity (duration) and may be either in possession or expectancy.

Joint tenants are those who have a joint title to real estate expressly created by one and the same deed or will. Upon the death of one joint tenant his interest passes to the survivors, and so on to the last survivor. By statute in Pennsylvania all joint tenants are converted into tenants in common.

Estates by entireties arise where title to land devolves by grant, devise or descent to a man and wife. Such can only be created during coverture. If the wife survives she takes the estate by survivorship clear of her husband's debts, for the reason that she does not take by or through him, but by virtue of the paramount grant to herself in the original conveyance. Coparceners are those who take land equally by descent from an ancestor, but an estate in coparcenary is practically obsolete in Pennsylvania.

Tenants in common are those who enjoy a unity of possession in real estate, and in Pennsylvania, with the exception of trust estates and estates by entireties, all estates held by a plurality of tenants are of this nature.

This concludes our inquiry into the nature of estates. We will next consider, under the title of Conveyancing, how such estates may be transferred.

Conveyancing.

Having concluded our inquiry into the nature and quantity of interest which a man may have in things real (real estate), the next question which logically suggests itself is: How may such interest be transferred? The right under which a man holds any interest in real estate is known as his title thereto, and conveyancing is that science which indicates the manner in which title to real estate may be transferred.

Title to real estate may be acquired either by conveyance, by devise or by descent. A perfect title comprises the union of possession, with the right of possession and the right of property. Mere actual possession is the lowest and most imperfect title to land, for both the right of possession and the right of property may be in another who has been dispossessed. Possession is, of course, *prima facie* evidence of title, and one in possession of real property may hold the same against all the world except the lawful owner. The real owner may, however, enter upon the land and dispossess one who has only a bare possession, provided he do so peaceably and does not violate the Statute of

Forcible Entry. A man may have a good title, combining possession, right of possession and right of property, nevertheless, it may not be a marketable title, which is such a title as a Court would compel a purchaser to accept. To constitute a marketable title it should not depend on any evidence outside of the record, except matters of pedigree, etc.

A Court will not decree a specific performance of a contract of sale if there is any reasonable or substantial doubt regarding the title.

Title to real estate, generally speaking, is acquired in either one of two ways: (1) By descent, or (2) by purchase. By descent is meant hereditary succession, or that title whereby a man acquires an estate by representation as heir upon the death of another. The word purchase has a very broad meaning and is that title to real estate which is acquired in any other way except by descent. The word descent is a technical word and applies only to real estate, as personal property does not descend, but goes to the executor or administrator to be disposed of and distributed by him under the law. Descent is the devolution of title upon the heir, and is confined to freehold estates of inheritance. An infant, an unborn child, an idiot, a married woman or a lunatic may be an heir and inherit real estate. The only exception to those who may inherit is found in the case of illegitimate children. In Pennsylvania, by statute, an illegitimate child may become legitimate upon the subsequent marriage and co-habitation of the parents. Although at common law an alien could not inherit real estate, he is given this right by statute the same as a natural born citizen.

Rights of Adopted Children.

If a person adopts a child legally the relationship thus created does not make the adopting parent a father or mother within the meaning of the intestate law.

The rule, however, providing that the property of an adopted child should pass, upon its death, to its natural parents, was changed by the act of April 13, 1887, so that to-day the adopting parents shall inherit from the adopted child to the exclusion of the adopted child's natural parents and kindred, but this act only applies to such property as the adopted child shall have inherited or derived from the adopting parents or their kindred.

Title vests in an heir by operation of law, for descent is inevitable. In Pennsylvania the descent of real estate by opera-

tion of law is regulated by the act of April 8, 1833, and before citing the provisions of this important act it is necessary to note the fact that estates tail and trust estates are not included within the operation of the act.

Descent depends upon consanguinity (blood relationship), which has been defined to be "the connection or relation of persons descended from the same stock or common ancestor."

Descent is either lineal or collateral. A lineal descendant is one who is descended in a direct line from another, as between a grandson and grandfather, and to determine the nearness of relationship each generation counts one degree. Collateral relationship exists between those who have descended from a common ancestor, but who do not descend one from the other.

Descent of Property Under Intestate Act.

The act of April 8, 1833, is of such general importance that the writer feels warranted in setting forth its leading provisions in full, as everyone should be familiar therewith as a matter of common knowledge. The first section of the act indicates the objects it affects, as follows:

"The real and personal estate of a decedent, whether male or female, remaining after payment of all just debts and legal charges, which shall not have been sold, or disposed of by will, or otherwise limited by marriage settlement, shall be divided and enjoyed as follows:

"Where such intestate shall have a widow and issue (children), the widow shall be entitled to one-third part of the real estate for the term of her life, and to one-third of the personal estate absolutely.

"Where such intestate shall leave a widow and collateral heirs, or other kindred, but no issue, the widow shall be entitled to one-half part of the real estate for the term of her life, and to one-half of the personal estate absolutely.

"Where such intestate shall leave a husband, he shall take the whole personal estate and the real estate shall descend and pass as hereinafter provided, saving to the husband his right as 'tenant by curtesy,' etc.

The Married Woman's Act of April 11, 1848, changes the interest which a husband takes in his deceased wife's property under the act above cited. It is provided by this latter statute that if a married woman possessed of separate personal property shall die without leaving a will, her estate shall be distributed as follows: "If such married woman shall leave no

children, nor the descendants of such living, the husband shall be entitled to such personal estate absolutely; if such married woman shall leave a child or children living, her personal estate shall be divided amongst the husband and such child or children, share and share alike; if any such child or children being dead, shall have left issue, such issue shall be entitled to the share of the parent."

Returning to the regulation of the descent of property under the Intestate Law of April 8, 1833, it is provided that subject to the estates given to the surviving husband or widow (as the case may be), the real estate of an intestate shall descend and be distributed among the issue in accordance with the following quoted rules:

"If such intestate shall leave children, but no other descendant, being the issue of a deceased child, the estate shall descend to and be distributed among such children.

"If such intestate shall leave grandchildren, but no child or other descendant, being the issue of a deceased grandchild, the estate shall descend to and be distributed among such grandchildren.

"If such intestate shall leave descendants in different degrees of consanguinity to him, the more remote of them being the issue of a deceased child, grandchild or other descendant, the estate shall descend to and be distributed among them as follows, viz:

"Each of the children of such intestate shall receive such share as such child would have received if all the children of the intestate who shall then be dead, leaving issue, had been living at the death of the intestate.

"Each of the grandchildren, if there shall be no children, in like manner shall receive such share as he or she would have received if all the other grandchildren who shall then be dead, leaving issue, had been living at the death of the intestate, and so in like manner to the remotest degree.

"In every such case the issue of such deceased child, grandchild or other descendant shall take by representation of their parents respectively such share only as would have descended to such parent, if they had been living at the death of the intestate.

"In default of issue as aforesaid, and subject also to the estates and interests hereinbefore given to the widow or surviving husband, the real estate shall go to the father and mother of such intestate during their joint lives and the life of the sur-

vivor of them, and the personal estate not otherwise hereinbefore disposed of shall be vested in them absolutely, or, if either the father or mother be dead at the time of the death of the intestate, the parent surviving such intestate shall enjoy such real estate during his or her life, and such personal estate absolutely."

The effect of the above provisions is to vest a decedent's estate in his issue, subject of course to the estate given the surviving husband or widow, if any. In case the descendants stand in the same degree of relationship to the decedent, as, for example, all children or all grandchildren, etc., they take in equal shares regardless of the fact that they may be of different parents. If, however, among an intestate's descendants there are both children and grandchildren, they take by representation of their parents such share only as would have descended to such parent if they had been living at the death of the intestate.

Collateral Descent.

If an intestate dies without leaving any descendants of any degree, his real estate descends to his collateral descendants, subject to the life estate given to the widow, surviving husband, father or mother, as the case may be. Collateral kindred may be either those who are descended from the father or mother of the intestate, which are called near collaterals, or those whose relationship with the intestate is derived from a common ancestor more remote than his father or mother, which class are called remote collaterals.

Near collaterals are again divided into those of the whole blood and those of the half blood, the former being those descended from both parents of the intestate, while the latter are those descended from only one of the parents of the intestate. Remote collaterals cannot inherit if any of the near collaterals are living, and near collaterals of the half blood cannot inherit the real estate if any of the whole blood are living, but personal property is divided among near collaterals without distinction of blood.

An intestate's brothers and sisters, and the descendants of them are near collaterals of the whole blood, with reference to whom the Intestate law provides as follows:

"If such intestate shall leave brothers and sisters, or either, of the whole blood, and no nephew or niece, being the issue of a deceased brother or sister of the whole blood, the real estate shall descend to and vest in such brothers and sisters.

"If such intestate shall leave neither brother nor sister of

the whole blood, but nephews or nieces being the children of such deceased brother or sister, the real estate shall descend to and vest in such nephews and nieces.

"If such intestate shall leave brothers and sisters of the whole blood, and also nephews and nieces, being the children of any such deceased brother or sister, the real estate shall descend to and vest in such brothers and sisters and nephews and nieces as follow: Every such brother and sister shall receive such share as he or she would have received if all the brothers and sisters who shall then be dead, leaving children, had been living at the death of the intestate, and such nephews and nieces shall take by representation of their parents respectively such share only as would have descended to such parents if they had been living at the death of the intestate.

"If such intestate shall leave neither brother nor sister of the whole blood, nor any nephew or niece, being the child of such deceased brother or sister, the real estate shall descend to and vest in the next of kin of such intestate, being the descendants of his brothers and sisters of the whole blood."

In default of collaterals of the whole blood the real estate passes to the father or mother in fee. Brothers and sisters of the half blood will only take an intestate's real estate in default of all previous classes.

Where all the preceding classes of descendants are wanting, near collaterals of the half blood are provided for, the act providing that if an intestate dies without leaving any descendant heretofore provided for, real estate of which such intestate died possessed shall descend to the brothers and sisters of the half blood of the intestate and their issue.

It is an old doctrine of the common law that no one can inherit real estate who is not of the blood of the first purchaser or original owner of the land. The Intestate Act in Pennsylvania modifies this doctrine somewhat in the following provision:

"That no person who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall in any of the cases before mentioned take any estate of inheritance therein, but such real estate, subject to such life estates as may be in existence by virtue of this act, shall pass to and vest in such other persons as would be entitled by this act if the persons not of the blood of such ancestor or other relation had never existed, or were dead at the decease of the intestate."

The Act, only the most important parts of which have been

set forth, concludes by vesting the real and personal estate of an intestate dying without any known heirs or kindred, widow or surviving husband, in the Commonwealth of Pennsylvania. The title which the Commonwealth acquires under such circumstances is known as Title by Escheat.

Title by Purchase.

Having concluded the discussion of how title to real estate may be acquired by descent, we turn to the second method of obtaining title to real estate, namely, by Purchase. Title by purchase may be acquired in five different ways: By Escheat, Occupancy, Prescription, Forfeiture and Alienation, the latter of which is by far the most important.

Title by Escheat, as above observed, happens when an owner of real estate dies without known heirs or kindred, when such real estate escheats to the State.

Title by forfeiture is where real estate is taken as a punishment under legal process, as for example, crimes, bankruptcy, etc.

By the law of Pennsylvania, lands are no longer forfeited on account of crimes. Few titles are at present obtained by forfeiture.

Title by occupancy, or as better known in Pennsylvania, by settlement, was a very favorite method of obtaining property prior to the Revolutionary War, but is of little importance to-day. When William Penn first landed in this State, he found several hundred Swedes and Dutch already settled here. To develop the province, the rights of any one who would settle upon a piece of land and cultivate it were respected, and such settler in time would acquire a title to the property by occupancy or settlement.

Prescription.

To quote a familiar adage: "Possession is nine points of law," and possession of real estate is *prima facie* evidence of title. Long and continued possession of property is held to be conclusive evidence of title, because if a man has had long, continued and uninterrupted possession of real estate it is only reasonable to assume that he has a lawful title thereto.

Where a person has had such long, continued and uninterrupted possession of real estate, he acquires what is known as a title by prescription, which presupposes a grant.

Strictly speaking, title by prescription only applies to

incorporeal hereditaments, as these only could be granted, as corporeal hereditaments required actual transfer. However, in Pennsylvania to-day, if a man has enjoyed continued and uninterrupted possession of real estate for twenty-one years adverse to anyone else, such party is said to acquire a title thereto by prescription.

The important subject of title by alienation, or the manner in which real estate is transferred by deed, will be considered next.

The last and most important method whereby title to real estate may be acquired by purchase is that of alienation, which, generally speaking, includes all modes of conveying real property between living men. The written instrument by which this transfer is made is called a deed.

A deed to be valid must possess the following requisites: (1) It must be in writing. (2) The parties thereto must be competent to contract. (3) There must be a valid consideration. (4) There must be a grant of property. (5) The deed must be properly executed, i. e., signed, sealed, attested and acknowledged. (6) It must be delivered and accepted. (7) It must be recorded. We will consider these various requirements separately and in their order.

In the first place, a deed is required by statute to be in writing and must set forth clearly the agreement between the parties. An indenture is the appropriate name of a deed to which there are two or more parties; a deed poll is the deed of a single party. Strictly speaking, there should be as many copies of an indenture as there are parties to it, but this is ordinarily omitted in practice except where several parties acquire estates or interests thereunder. Where several copies are made they form together but one deed, one of the parts being called the original, while the remainder are called counterparts. Careful conveyancers still adhere to this practice, but as a deed is required to be recorded, a certified copy of the record is as effectual in evidence as if the original were produced in Court. The words with which an indenture concludes—"the said parties have interchangeably set their hands and seals"—show the custom of having several parts.

A deed must contain operative words of conveyance, the words in common use being "give, grant, bargain and sell." In connection with the necessity of every deed being in writing, it should also be observed that no alteration or interlineation should appear in the body of the deed. If it is necessary to make an alteration in the body of the deed the erasure or interlineation

should be noted upon the instrument above the attestation clause.

The law provides that any transfer of any interest or estate in lands, tenements or hereditaments which is made by parol, and which is not put in writing and signed by the parties so transferring such interest, shall have the force and effect of leases or estates at will only. Every transfer of any interest in real estate should be in writing, although the law does not require this to be done in the case of a lease of real estate for a term not exceeding three years.

Sufficient Parties.

With reference to the parties to a deed, the law requires that the grantor must have title or capacity to convey, and that the grantee must have proper capacity to take and hold real estate.

In Pennsylvania the presumption is that a corporation has no power to hold real estate, and legislative authority must be shown to entitle them to do so.

Unincorporated societies cannot hold real estate except as trustees for a charitable use.

Any person under twenty-one years of age, not having full capacity to contract, cannot be a party to a valid deed. A deed made by an infant is voidable, but after arriving at full age may be either ratified or avoided. Infants may, however, hold lands as trustees for another.

The deed of an insane person is void, but such a deed may be rendered valid if the insane person subsequently recovers his reason and ratifies the same.

Under the act of April 4, 1901, a married woman may convey her real estate by deed, providing her husband join in such deed, but without the necessity of a separate acknowledgment by the married woman. Likewise a married woman may transfer her interest in her husband's real estate by jointly executing his deed and releasing her rights therein.

The law prohibits one partner from transferring any partnership property without the authorization of the co-partners, and any one purchasing real estate from a partnership should see that such authorization was given.

In summarizing the competency of parties to a deed it may be laid down as a general rule that anyone who is competent to make a valid contract is also competent to make a valid deed for the conveyance of real estate.

Consideration.

As in the case of any contract, a deed is required to be supported by a valuable consideration, which, however, need not be expressed in the deed, as where a receipt is subjoined which acknowledges the transfer of money. It is also allowable to prove the consideration by oral evidence. There are two kinds of considerations recognized by the law as being sufficient: (1) valuable consideration, and (2) good consideration. A valuable consideration is money or other property which bears a known value. It has been held that a marriage constituted a valuable consideration for the transfer of real estate.

If a valuable consideration is lacking, a deed may be supported by what is known as a good consideration, which is such as cannot be said to have a pecuniary value, but which rests upon moral grounds, such as the natural love and affection which a man bears to his blood relatives or kindred. If the grantor has existing creditors, a good consideration will not be sufficient to support a transfer of property.

The Estate Conveyed.

A deed transfers title to land and the rights issuing out of lands. The conveyance of a mere expectancy is impossible at law, but may be enforced in equity as an executory agreement to convey, which agreement must be sustained by a valuable consideration.

It is necessary to describe specifically in a deed the land transferred thereby. The descriptions of city property should be very full, accurate and complete. Such descriptions should set forth monuments, courses and distances, and the quantity of land conveyed. By monuments we mean such landmarks as are set up for the purpose of indicating boundaries, such monuments being of two kinds—natural and artificial.

Natural monuments are such objects as nature has placed on the land, such, for example, as rivers, trees, ponds, etc.

Artificial boundaries are means which man has placed on land for the purpose of indicating boundaries, such as fences, roads, walls, etc. Very high regard is given by the law to natural monuments, and existing ones may be proven by parol evidence.

If land conveyed by a deed is bounded by a navigable river, the boundary line should be described as extending to the low-water mark of such stream. If the stream is not a navigable one, and the land is described as being bounded on or running along

said stream, the boundary line will extend to the center of the stream, which of course would change with the natural change of the stream.

In the case of ponds and lakes, the boundary line is along the edge at low-water mark, provided the lake is a natural one. If the pond or lake is an artificial one, the boundary extends to its center.

If a deed describes the land as being bounded on or along an open highway or street, the boundary line is the center of the street.

It is a well-settled rule of law that whatever belongs to the land granted as part of it will pass with the grant of the land unless in the deed it is expressly reserved.

Execution.

If it is required by either party, the deed must be read in order to be binding, but there is a presumption that every party to a deed is thoroughly familiar with its contents.

After reading a deed, the same must be signed by the grantor or by an agent duly authorized to act for him. An agent to qualify as such must have a power of attorney under seal signed by his principal, or he must execute the same in the presence of his principal. In case the grantor is a person who cannot write, his signature may be made by a mark, but such mark should be attested by the person who writes the name of the party, who should sign as a subscribing witness.

Until sealed, a writing is not a deed, but it is not necessary that such writing be sealed in order to operate as a conveyance of land. A seal gives certain effect to the statements contained in a deed, but is not required to be attached to a deed under the Statutes of Frauds, etc.

Any scroll or mark of ink is sufficient if it clearly indicates the intention of the grantor to regard it as a seal. Usually a scroll is made around the word "Seal" or "L. S." The deed of course recites the fact that the grantor has affixed his seal thereto. The corporate seal is ordinarily used in all corporate deeds, but it has been held that a deed signed by the president of a corporation, with an ink scroll opposite his name, is sufficient.

Attestation.

It is not necessary under the law of Pennsylvania that a deed be witnessed, but it is a wise precaution to have two persons sign their names as witnesses to the signature of the grantor. A

person dealing with a corporation should ascertain the authority of the officers, as a corporate seal should be attested by the signature of the president and of the officer who has charge of the seal, this officer usually being the secretary.

Acknowledgment.

The party signing a deed is required to appear and acknowledge before a competent officer, most commonly a notary public, that the deed is his act and deed and that he desires the same to be recorded as such.

The party taking the acknowledgment must not be interested in the conveyance, otherwise the certificate will be valueless.

Delivery.

The deed being signed and sealed, is now ready to be delivered, delivery of the deed being absolutely necessary to pass title, the same taking effect, as between the immediate parties, from the date of delivery. Possession of a deed by a grantee is presumptive evidence of delivery, but if the deed came into his possession without the knowledge or consent of the grantor, no title will pass.

When a deed is delivered by the grantor to a third party, to be held until certain conditions have been performed, upon which it is to be transferred to the grantee, it is said to be delivered in escrow.

Recording.

To render a deed valid and complete it is further required that the same be recorded.

Almost the first act performed by William Penn upon landing in Pennsylvania was to establish an office for recording deeds.

The purpose of recording a deed is to give every one notice of the exact condition of the title to real estate, as an innocent purchaser is thus guided in knowing what he is buying.

Every deed or instrument of writing by which title to lands, tenements or hereditaments is transferred or affected in law or in equity must be recorded, after having been first acknowledged or proved.

Deeds should be recorded immediately, but if executed within Pennsylvania they may, under the statute, be recorded within three months, and if executed outside of Pennsylvania they may be recorded within six months.

In Philadelphia county, deeds are only valid as against subsequent purchasers for value from the date of recording. The necessity for promptly recording a deed cannot be overestimated. Where a forged deed is recorded one who buys on the strength of the record takes no title, even an innocent purchaser not acquiring title in this way.

Having considered the requisites of a valid deed, we will direct our attention next to an analysis of the component parts of a deed, it being borne in mind that in a course of this character, our object is to emphasize only the most important features of a deed.

A deed may be divided into the following parts:

1. The Premises, which include the date, the name of the parties, the recitals, the consideration and receipt of same, operative words of conveyance, the description of the thing granted, and reservations and exceptions.
2. The Habendum, which begins with the words "to have and to hold," and indicates the quantity of estate granted.
3. The Tenendum, of no use at the present time.
4. The Reddendum, being that clause of the deed reserving rent or other interest in the estate to the grantor.
5. The conditions upon which an estate is granted (being either conditions subsequent or conditions precedent, which we considered under estates upon conditions).
6. Warranty.
7. Covenants, either on the part of the grantor or grantee to do or refrain from doing something in relation to the estate granted.

In our last discussion we concluded by indicating the component parts of a deed, upon which it would be well to make a few brief observations.

The various requisites of a deed need not of necessity be included in the premises, but will be equally effective if appearing in other parts of the deed. If the date of the deed is omitted, the presumption is that the date of delivery is the date of the deed.

Immediately after the premises comes the habendum, with which in recent times the tenendum is joined. The object of the habendum is to limit and define the quantity of estate which the grantee is to take. It is possible to omit the habendum altogether from a deed without invalidating it. The quantity of estate having been stated in the granting part of the premises, the use of the habendum is to either lessen, enlarge, explain or qualify the estate limited in the premises. Although the habendum may explain and

qualify the premises it cannot, however, be totally repugnant to them.

If it is desired to create any trusts, they are declared after the words in the habendum limiting the quantity of estate granted. If there are any incumbrances in the nature of mortgages, ground rents, building restrictions, etc., against the estate, they should be next mentioned commencing with the words "under and subject nevertheless."

The reddendum is that part of a deed which reserves a rent or other interest in the estate to the grantor. It usually follows the habendum, beginning with the words "Yielding and paying therefor and thereout, unto the said John Doe, his heirs and assigns, the yearly rent or sum of () dollars," etc.

The conditions annexed to the estate granted follow the reddendum.

The warranty and covenants which come after the conditions, may be considered together. A covenant is an agreement under seal, and every agreement contained in a deed is a covenant, for the reason that every deed is required to be sealed. Covenants may be either express or implied.

An express covenant contained in every deed is the covenant on the part of the grantor that he is lawfully seized and has a good right to convey the estate. Another important express covenant in a deed is that against incumbrances, such as unpaid taxes, easements, outstanding mortgages, etc. Incumbrances are of two kinds: (1) those which affect the title, and (2) those which affect the physical condition of the property. A covenant of quiet enjoyment is an assurance against a defective title and any disturbance thereunder. This covenant, in effect, has been practically superseded by the covenant of warranty, which is the most useful of all covenants. It guarantees the grantee against not only existing claims, but also such as may be presented against the land in the future. The covenant of warranty is a personal obligation, and may be barred by the Statute of Limitations. The warranty contained in the ordinary Pennsylvania deed is a special warranty.

Implied Covenants.

Certain covenants in a deed arise by implication. Thus two covenants are implied from the words "grant, bargain and sell:" (1) that of title in the grantor, and (2) that of quiet enjoyment.

The principal distinction in covenants is between real covenants and personal covenants, that is to say, between

covenants which are said to run with the land and those which do not. As a matter of fact, all covenants are personal and bind the covenantor (the party making the covenant) personally; but some covenants are only personal, while some bind the lands in the hands of the heir or assignee of the covenantee the same as the covenantor. A real covenant may be defined as one which runs with the land and descends to the heir and is transferred to a purchaser. For example, a real covenant made by a grantee or lessee will not only bind such grantee or lessee, but also the assignee of said grantee or lessee, so that the grantor or lessor or their heirs could bring an action on the covenant at any time. Covenants of warranty, covenants to pay rent, covenants imposing restrictions upon building, the performance of which affect the nature, quality or value of the land conveyed, are illustrations of real covenants or those which run with the land. Covenants which run with the land may be implied as well as expressed.

Common Law Conveyances.

Conveyances are divided into two classes: (1) Original or primary, and (2) secondary or derivative. The first class includes those which create an estate in land; the second class are those which enlarge, restrain, transfer or extinguish an estate already created. The principal conveyances of the first class are gift, grant, lease, exchange and partition, feoffment having become obsolete. Secondary conveyances comprise release, confirmation, surrender, assignment and defeasance. It will only be necessary to explain a few of these conveyances, as the others have been covered heretofore.

An exchange is a mutual grant of equal interests, the one in consideration of the other. When an exchange of one property for another is desired, mutual deeds of bargain and sale, with the usual covenants of title, are preferred and adopted by modern conveyancers.

A partition is effected when two or more persons having unity of possession of real estate agree to divide the same, each having a distinct part.

A release is a conveyance of a man's right in real estate to one who had a former estate in possession thereof. The essential words in this conveyance are: "Remise, release and forever quit claim."

A confirmation is a conveyance of an estate whereby a voidable estate is made sure and unavoidable. Thus the deed of a

minor which is voidable may be confirmed upon reaching majority.

The converse of a release is a surrender, which is that conveyance whereby a man yields up a less estate in possession to one who has a greater estate in remainder. For example, where a tenant for life gives his estate to the remainderman or reversioner, i. e., to the party entitled to his estate upon his death.

An assignment is merely a transfer of an estate in lands, usually of a term of years, and is frequently used in transferring a ground rent or a bond and mortgage.

A defeasance is a collateral deed affixing conditions to an estate granted by another deed made at the same time.

Construction of Deeds.

Having considered the various kinds of deeds, the component parts thereof, and the manner of their execution, the subject cannot be concluded without a brief inquiry concerning the rules which regulate their construction.

The Courts always aim to construe a deed favorably in order that they may take effect, if possible, and carry out the intention of the parties thereto. In determining the intention of the parties, the Courts have much more consideration for the substance than for the form of deeds. Blots, bad spelling, bad grammar, etc., will not invalidate a deed; neither will erasures or interlineations, provided they are made before the deed was executed. A deed will be interpreted as a whole; that is, if a particular part is in dispute, its construction will be governed by that which precedes, as well as that which follows it. Another well-established rule of construction is that the words of a deed will always be taken most strongly against the party employing them. The existence of fraud in connection with a deed will invalidate it. A man who is in debt cannot give away his property except for a sufficient consideration. Even if the sale of real estate is for a full price, which is actually paid, if the object of the sale is to defraud creditors and the purchaser knows it and aids and assists the plan, his title is worthless as against creditors. If, however, a sale is made without a present payment of money, but in payment of a prior debt which is honestly due, it will not be held fraudulent. Care should be exercised in making a conveyance without consideration, for as between the parties and those claiming under them such a conveyance will be valid.

It is a common custom in conveying property for the purpose of placing the same out of the reach of creditors to place the same

in the name of the wife of the debtor. This practice, is, however, subject to certain risks. If a man, while insolvent, transfers his property to his wife, the presumption is that the husband furnished the means of payment and the law places the burden upon the wife, if her title is questioned by her husband's creditors, of proving that she paid for the property out of her own separate money.

Title by Matter of Record.

It has frequently occurred that title to real estate cannot be transferred for want of a person having capacity to convey the same. It has been the policy of the Legislature of Pennsylvania to free from all obstacles the transfer of title to real estate, and many statutes have been passed conferring upon our Courts jurisdiction and power to order the sale of lands which could not otherwise be transferred. An important item, therefore, under the general head of title by matter of record, is judicial sales, which includes sales under execution and sales by order of Court. Our Constitution declares that private property shall not be taken from one in lawful possession thereof, without due process of law, which means a judgment rendered in due course of the administration of law. The judicial power being vested by the State Constitution in the Courts of law, only a Court of law can render such a judgment. By a special provision of our Constitution, the Legislature may take private property for public uses upon making proper compensation, which right is known as the right of eminent domain.

Innumerable titles to real estate are acquired by sheriff's sales. It is impossible in a course of this character to indicate the various ways in which a sheriff's sale may be brought about, but it is very important to a real estate man to know how to judge the validity of a title which has been conveyed by a Sheriff by deed duly acknowledged in open Court, and entered upon the records according to law.

It may be stated as a general rule that the acknowledgment and delivery of a Sheriff's deed cures all irregularities and establishes a good title to the property sold. A sheriff's sale to be valid must be based upon a judgment in a Court having proper jurisdiction, and must be free from collusion and fraud. The title which a purchaser at sheriff's sale acquires is that which the defendant in the judgment had at the time the execution was levied. His title is not affected by a prior unrecorded deed, and he is not affected by any secret trusts of the existence of which

he was ignorant. Upon a sheriff's sale of real estate for taxes or municipal claims, the owner has the right to redeem by paying the purchaser all his costs and charges and the purchase money with twenty per cent. added thereto.

Besides sheriff's sales, the Courts of Common Pleas and Orphans' Court have power to decree the sale of real estate under certain circumstances, and in such case it is the Court which makes the conveyance, and it is hence immaterial whether or not the person who signs the deed has legal capacity to do so. If the circumstances are such as to convince the Court that a sale ought to be made, scarcely a case can arise where the power to sell and convey real estate is wanting that such power cannot be supplied by the order of a Court.

The subject of real estate cannot be properly concluded without a consideration of title by devise, or that title to lands which is created by will, being the last method whereby title to real estate may be acquired by purchase.

When real estate is transferred by a will it is called a devise; when personal property is transferred, it is called a bequest.

The two principal characteristics of a will are: (1) That it cannot take effect before the death of the testator or maker, and (2) it is revocable any time before death.

Wills may be either unwritten or written. An unwritten will, known as a nuncupative will, is one made by word of mouth and can only effect a disposition of personal property. It is further required that an unwritten will, to be valid, must be made during the last illness of the testator. If the property is in the form of money, and exceeds in amount one hundred dollars, it must be proved that the testator when he pronounced the bequest bid those present to witness that such was his last will. Two competent witnesses are necessary to prove an unwritten will.

Unless a person is prevented from making a will in writing by the extremity of his last illness, a will must be made in writing.

Every person of sound mind who is twenty-one years of age or upward may make a will. Every will must be signed by the maker at the end thereof, or by some person in his presence and by his express direction. The rule that every will must be in writing as regards devises of real estate is without any exception whatever.

In Pennsylvania it is not necessary to have any subscribing witness to a will, although it is preferable to do so, the law merely requiring that a will must be proved by two witnesses. A will

which gives property to a religious or charitable organization must have two disinterested subscribing witnesses. Likewise in many States, wills devising real estate require subscribing witnesses, in some States two, in others three. Wills in Pennsylvania purporting to pass real estate in such States must be witnessed accordingly.

A will transferring real estate cannot be revoked or altered except by a will or codicil (addition to a will) executed and proved like a will, unless the testator burns, destroys or cancels the same. A will of lands operates as a conveyance of title.

CREDITORS' PETITION IN BANKRUPTCY

In the District Court of the United States

For the

District of

The Petition of

respectfully shows:

That

of _____, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [or resided, or had his domicile] at _____ in the County of _____, and State and District aforesaid, and owes debts to the amount of \$1,000.

That your petitioners are creditors of said _____, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500. That the nature and amount of your petitioners' claims are as follows:

And your petitioners further represent that said _____ is insolvent, and that within four months next preceding the date of this petition the said _____ committed an act of bankruptcy, in that he did heretofore, to wit, on the _____ day of _____

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon _____

as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

Attorney.

Petitioners.

PROOF OF SECURED DEBT

In the District Court of the United States

For the

District of

IN THE MATTER OF

Bankrupt.

} No. In Bankruptcy.

At

of

A. D. 191

came

on the

, in said District
day of

of

in the County of

in said District of

and made oath, and

says that

, the person

by [or against] whom a petition for Adjudication of Bankruptcy has
been filed, was at and before the filing of said petition, and still is,
ustly and truly indebted to said deponent in the sum of

Dollars; that the

consideration of said debt is as follows:

that no part of said debt has been paid [except

that there are no set-offs or counterclaims to the same [except

and that the only securities held by this deponent for said debt are the
following:

Creditor.

Subscribed and sworn to before me this

day of

A. D. 191

(Official Character.)

PROOF OF UNSECURED DEBT

In the District Court of the United States

For the

District of

IN THE MATTER OF

Bankrupt.

} No. In Bankruptcy.

At

of

A. D. 191

came

on the

day of

, in said District

of

in said District of

in the County of

and made oath, and says

that

, the person

by [or against] whom a Petition for Adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of

Dollars; that the consideration of said debt is as follows:

that no part of said debt has been paid [except

that there are no set-offs or counterclaims to the same [except

and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever, and that no note has been received for said debt and no judgment rendered thereon.

Creditor.

Subscribed and sworn to before me this day of
A. D. 191

(Official Character.)

PROOF OF DEBT DUE CORPORATION

In the District Court of the United States

For the District of

IN THE MATTER OF

Bankrupt.

} No. In Bankruptcy.

At , in said District
of on the day of , A. D. 191
came
of in the County of and State
of and made oath, and says that he
is of

a corporation incorporated by and under the laws of the State of
and carrying on business at
in the County of and State of and that he is duly
authorized to make this proof, and says that the said
the person by [or against] whom a Petition for Adjudication of Bankruptcy has been filed, was at and before the filing of the said petition, and still is, justly and truly indebted to said corporation in the sum of
Dollars,
that the consideration of said debt is as follows:

that no part of said debt has been paid [except

that there are no set-offs or counterclaims to the same [except

and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever, and that no note has been received for said debt and no judgment rendered thereon.

of said Corporation.

Subscribed and sworn to before me this day of ,
A. D. 191

(Official Character.)

PROOF OF BOOK ACCOUNT

County of ss.

The Commonwealth of Pennsylvania

On the day of Anno
Domini 19 , before me,

personally appeared

who being duly sworn or affirmed, according to law, doth depose and say, that the annexed account against

is correctly copied from the books of Original Entry of

that the charges were made in said books at or about the time of their respective dates; that the goods for which said charges were made were sold and delivered as charged; that the charges are correct, and the account just and true as stated; that there is now due and owing thereon the sum of Dollars

that no part of said sum has ever been paid or in any manner settled, and that there are no deductions or offsets of any kind, except such as are therein specified and credited.

Sworn or affirmed to, and subscribed before me, this

day of A. D. 19

Witness my hand and
aforesaid.

seal, the day and year



BANKRUPTCY.

Acts of Bankruptcy—The Petition—Who May Become Bankrupts—Bankruptcy of Partnerships—Exemptions—Duties of Bankrupts—Compositions with Creditors—Discharge—Offenses—Preferences—Provable Debts.

NO more important subject presents itself for the consideration of the practical business man than that of bankruptcy. As everyone is likely to become involved, directly or indirectly, with bankrupt estates, it is essential to acquire a clear understanding of the principles which regulate such proceedings.

The Constitution of the United States vests in Congress the power to regulate bankruptcy proceedings, which power has been exercised by the enactment of several statutes, the law now in force being the act of 1898, and supplements, which as a national bankruptcy law has been found to be quite effective.

It will be necessary to discuss this subject in the form of a general synopsis of the acts of Congress, with such explanations as may conduce to a clear understanding thereof.

In the first place, bankruptcy proceedings are under the control and supervision of the district Courts of the United States, which are given original jurisdiction to adjudge persons bankrupt, to allow and disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; to appoint receivers if necessary for the preservation of estates, to take charge of a bankrupt's property, to try and punish bankrupts violating the laws of the United States, cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, to close estates whenever it appears that they have been fully administered, confirm or reject compositions between debtors and their creditors, determine all claims of bankrupts to their exemptions, discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases, to appoint and remove trustees and to tax costs whenever they are allowed by law. Besides the principal powers above enumerated, the jurisdiction of a Court of Bankruptcy is sufficient to properly regulate all matters appertaining to bankruptcy.

The object of our law is to enable an individual, firm or

corporation becoming bankrupt to surrender all assets to the Court, which shall distribute the same to creditors and in due course of time discharge the bankrupt, which discharge shall operate as a release of all indebtedness. The procedure enables one who has become bankrupt to adjust his affairs in such a way that he may resume business with a clear record.

Acts of Bankruptcy.

The statute specifies five acts, the commission of any of which constitutes bankruptcy.

"Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

The intent with which a man transfers his property is the important element in the first-mentioned act of bankruptcy. That a transfer or concealment of property was made with intent to defraud creditors must be clearly established by him who asserts it. The fraudulent intent may be inferred from the necessary consequences of the act.

A transfer of property while insolvent for the purpose of giving one creditor a preference over another is an act of bankruptcy very frequently committed. The elements of preference are (1) insolvency, (2) intent to prefer and (3) a transfer of property.

The first section of the act of 1898, defines insolvency as follows: "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed,

transferred, concealed or removed, or permitted to be transferred, concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

The intent to prefer one or more creditors over others will be presumed when the transaction consists in a transfer of personal property by way of payment. A debtor is presumed to know his financial condition, and, therefore, payments by one knowing himself to be insolvent raise a conclusive presumption of intent to prefer.

A transfer of property affords a very strong presumption of an intention to prefer if there are any creditors unprovided for.

The third act of bankruptcy occurs when an insolvent debtor allows a creditor to obtain a preference over other creditors through any legal proceeding without discharging the same at least five days before a sale or final disposition of any property affected by such preference. A debtor shall be deemed insolvent and his estate shall become subject to compulsory liquidation if he permits any execution issued against him under which any of his chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied.

General Assignment or Receivership.

The making of a general assignment for the benefit of creditors, with or without preferences, has always been an act of bankruptcy. This fourth act of bankruptcy has been amended by the act of 1903, so that now a co-partnership, or a corporation, which is insolvent and applies for or, because of insolvency, has been put in charge of a receiver or trustee, under the laws of a State, or of a Territory or of the United States, thereby commits an act of bankruptcy. Owing to the lack of comity between the States, a receiver of an insolvent corporation in one State is rarely recognized in another, the result being that the creditors in one State could secure preferences over those in another. As it is one of the general purposes of the bankruptcy law to provide a uniform national law, by which insolvent traders can make a *pro rata* distribution of their assets among all creditors, this amendment of 1903 was passed, and consequently a corporation or co-partnership which attempts to wind up its affairs by means of a receivership appointed by a State Court may be adjudged an involuntary bankrupt under the Federal statute.

The fifth and last act of bankruptcy which we shall consider is committed by an admission in writing of one's inability to pay his debts and his willingness to be adjudged a bankrupt on that account. It is not to be expected that in his correspondence a debtor who is a natural person will, with a purpose to get into bankruptcy, both confess inability to pay his debts and a willingness to be adjudged a bankrupt; the filing of a voluntary petition is more direct. The value of this act did not appear until the fact that corporations might through it become, in effect, voluntary bankrupts was generally recognized. Three elements are necessary to this act of bankruptcy: (1) A writing signed by the debtor or some officer or agent duly authorized; (2) a distinct admission therein of his inability to pay his debts, and (3) an unqualified expression of willingness to be adjudged a bankrupt on that ground.

The Petition.

If a person has committed any one of the above mentioned acts of bankruptcy, an interested party may petition the Court to have such a person adjudged a bankrupt. Such petition may be filed within four months after the commission of the alleged act of bankruptcy, and such time shall not expire until four months after (1) the date of recording the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.

Solvency at the time of filing the petition constitutes a complete defense to any proceedings in bankruptcy. It is conceivable that a debtor may have been insolvent at the time the act of bankruptcy was committed, but not when the petition was filed. If solvency at such date is proved by the alleged bankrupt, the proceedings will be immediately dismissed. The burden of proving solvency is always on the alleged bankrupt. If this defense is relied on, the alleged bankrupt must appear in Court at a preliminary hearing, with his books, papers and accounts, and submit to an examination, and testify as to all matters tending to establish solvency or insolvency. When the

bankrupt puts his solvency in issue and appears and gives testimony, the burden of proving him a bankrupt shifts to the petitioning creditors.

If a petition is filed by one person for the purpose of having another adjudged a bankrupt, and an application is made to take charge and hold the property of the alleged bankrupt, or any part of the same, pending a hearing on the petition, the petitioner or applicant must file in Court a bond, with two sufficient sureties residing within the jurisdiction of the Court, in such sum as the Court shall order, the condition of said bond being the payment to the alleged bankrupt, in case the petition is dismissed, of all costs, expenses and damages occasioned by the seizure of the alleged bankrupt's property.

Who May Become Bankrupts.

The fourth section of the Federal Bankruptcy act specifies the class of persons who may acquire protection under the law, either as a voluntary or involuntary bankrupt, as follows:

"Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company and any corporation engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits, owing debts to the amount of \$1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

The amendment of 1903 further provides that the bankruptcy of a corporation shall not release its officers, directors or stockholders, as such from any liability under the laws of a State, Territory or of the United States.

Although it has been held that an infant is entitled to the benefit of the bankruptcy act, the better opinion appears to be that a petition in bankruptcy can neither be filed by nor against a minor. An alien may file a petition in bankruptcy as soon as he has acquired the necessary residence in the United States. A married woman may, in those States wherein they are given power to contract, become a bankrupt and secure the benefits of the act.

Any person owing debts may become a voluntary bankrupt,

but to institute involuntary proceedings the debtor must, under the act, owe at least \$1,000. There are two classes of persons who cannot be petitioned against—wage-earners and farmers. A wage-earner has been held to be any person who works for wages, salary or hire at a compensation not exceeding \$1,500 per annum. If a man is engaged in farming as the occupation which he considers of paramount importance to his welfare he cannot be adjudged an involuntary bankrupt. The class of corporations which may be adjudged bankrupt is specially limited by the act, principally to trading corporations or those engaged in mercantile pursuits. A livery stable company, a sanitarium and a mercantile agency have been held to be trading corporations, while a theatrical company, a saloon and restaurant company and a mutual fire insurance company have been held not to be trading corporations, and hence not capable of going through bankruptcy.

If a corporation has been discharged in bankruptcy its creditors are not prevented from proceeding in a State Court against the officers and stockholders to satisfy their liability.

Partners.

In view of the large number of partnerships existing it is important to determine how they are affected by bankruptcy proceedings.

The law provides that a partnership, during the continuation of the partnership business or after its dissolution, and before its affairs are finally settled, may be adjudged a bankrupt. It will be recalled that in our study of partnerships we stated that the law of Pennsylvania regarded a partnership as a collection of individuals, and could not be considered separate and distinct from the members composing it. But so far as bankruptcy is concerned, a partnership is treated as a legal entity, the identity of the various partners in bankruptcy being lost, and therefore the individual partners and the partnership are entities separate and distinct from each other. Thus, one or more partners may file their petition in bankruptcy without making the others parties, but notice of the pendency of the proceedings must be given to the other partners. Where two partners of a firm of three have filed a petition to have the firm put in bankruptcy, the District Court of the United States has jurisdiction over the partnership property, even though the third partner is proceeding in a State Court for a settlement of the partnership affairs.

The creditors of the partnership shall appoint the trustees (the officer who takes title to all property belonging to the

partnership). In other regards the estate is administered as provided for in any other estate.

The general rule that whatever a partner does within the scope of the partnership binds the other partners, applies to the commission of acts of bankruptcy. The application for or the appointment of a receiver of a partnership is an act of bankruptcy the same as in cases of corporations.

The Court of Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. The trustee appointed is obliged to keep separate accounts of the property belonging to the partnership and the property belonging to the individual partners thereof.

The expenses of administration are apportioned between the partnership estate and the estate of the individual partners, as the Court shall determine.

If one member of a firm has a claim against it, the same may be proved in bankruptcy against the firm, and *vice versa*. A solvent partner cannot, however, prove a claim against the separate estate of his bankrupt partner until all the partnership creditors have been paid in full. The Court is given power to marshal the assets of the partnership estate and the estates of the individual partners so as to prevent preferences and secure the equitable distribution of the property of the several estates.

Distribution.

The law provides that the net proceeds realized from a sale of partnership property shall be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

If one or more, but not all, of the partners become bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners who were not adjudged bankrupt. The partner or partners not adjudged bankrupt shall wind up the partnership business as

expeditiously as possible and account for the interest of the partner or partners who have been adjudged bankrupt.

Exemptions of Bankrupts.

The sixth section of the Bankruptcy act provides that it "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition, in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." A Court of Bankruptcy has jurisdiction to determine the merits of the bankrupt's claim to exemptions, but has no jurisdiction over the property. The individual members of a bankrupt partnership are not entitled to exemptions out of the partnership property. Their interest, as individuals, in the joint property, is an interest in the surplus only. A bankrupt may expressly or impliedly waive his exemption. If a bankrupt fails to claim his property which is exempted by law at the proper time, the law implies that he has waived this right. He may expressly waive exemption in writing.

Duties of Bankrupts.

The law imposes certain duties upon a bankrupt which it is essential to observe. He must attend the first meeting of his creditors if ordered to do so by the Court.

If he resides more than one hundred and fifty miles from the place of meeting, special cause must be shown to require his attendance, and if ordered to attend he is entitled to his actual expenses. He must also attend the hearing upon his application for a discharge, and comply with all lawful orders of the Court. He is required to examine the correctness of all proofs of claim filed against his estate. As a rule the bankrupt sits by at the call of claims on the first meeting of creditors and informs the referee whether they are correct. He must execute and deliver such papers as shall be ordered by the Court, such, for example, as the assignment of a license and the transfer of an insurance policy. He must also execute to the trustee in bankruptcy transfers of all his property in foreign countries. It is the duty of a bankrupt to immediately inform his trustee of any attempt by his creditors or other persons to evade the provisions of the Bankruptcy act, and in case anyone has to his knowledge proved a false claim he must disclose this fact at once to the

trustee. One of the most important duties required of a bankrupt is to prepare, make oath to and file in Court within ten days after he has been adjudged a bankrupt, if the proceedings are involuntary, and if voluntary, to file with the petition, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residence, if known, and if unknown that fact is to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any and a claim for such exemption as he may be entitled to. This schedule must be made in triplicate. A bankrupt is also required to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate. In order to aid a full disclosure of all necessary facts, the law provides that no testimony given by a bankrupt shall be offered in evidence against him in any criminal proceeding.

The schedule of a bankrupt's property, debts, creditors, etc., may always be amended if incomplete or defective. The examination of a bankrupt is usually reduced to writing and signed by him.

Death or Insanity of Bankrupts.

The proceedings in bankruptcy do not end upon the death or insanity of a bankrupt, but the same shall be conducted and concluded in the same manner as though he had not died or become insane. If a bankrupt become insane, a committee will be appointed to represent his interests. The death of a bankrupt will not prevent his discharge therefrom, even though the requirement calling for the personal presence of the bankrupt cannot be complied with. In event of the death of a bankrupt, the law provides that his widow and children shall be entitled to all rights and dower and allowance as exist by the laws of the State of the bankrupt's residence.

Protection and Detention of Bankrupts.

A bankrupt is exempted from arrest upon any civil process, with the two following exceptions: (a) when such arrest is by order of a Court of Bankruptcy for contempt or disobedience of its lawful orders, or (b) when the warrant is issued from a

State Court having jurisdiction and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a Court of Bankruptcy or engaged in the performance of a duty imposed by this act.

Upon satisfactory proof by the affidavits of at least two persons that a bankrupt is about to leave the district in which he resides, and that his departure would defeat the proceedings in bankruptcy, the Court may issue a warrant under which the bankrupt may be taken in custody and detained not longer than ten days. An application to detain a bankrupt can be made only between the time of filing the petition and the expiration of one month after the qualification of the trustee.

If a warrant for the apprehension of a bankrupt has been issued and he shall be found within the jurisdiction of a Court other than the one issuing the warrant, he may be extradited in the same manner as persons under indictment are extradited from one jurisdiction to another.

Suits by and Against Bankrupts.

Any suit at law which is founded on a claim from which a discharge in bankruptcy would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined. The power to stay suits concerning the person or property of the bankrupt is essential to the orderly administration of a bankruptcy law, the purpose of such stays being to prevent the harassment of the bankrupt by suits, pending a discharge which will be a bar. Only such suits as are founded upon claims from which a discharge would be a release can be stayed.

The trustee in bankruptcy may, upon order of the Court, defend or prosecute suits brought by or against the bankrupt estate, but no suit can be brought against the trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Compositions with Creditors.

After a bankrupt has been examined in open Court or at a meeting of his creditors and filed in Court a schedule of his property and a list of his creditors, he may offer terms of com-

position to them. The theory of a composition is that the cash value of the bankrupt's estate is to be substantially divided among the creditors in proportion to their respective debts. Whether it is expedient to accept the percentage offered by a bankrupt is a question for the creditors to determine.

Before an application to confirm a composition with creditors can be filed it must be accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must also represent a majority in amount of such claims. It is further necessary before filing such an application to deposit in Court the consideration to be paid to creditors and the money necessary to pay debts entitled to priority and the expenses of the proceedings. A date and place is fixed for a hearing upon such an application, when and where objections, if any, may be made to the confirmation of the composition. A Court will confirm a composition if satisfied that it is for the best interests of the creditors; that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and that the offer and its acceptance are made in good faith. If the composition is confirmed the consideration shall be distributed as the Court shall direct and the case be dismissed. If it is not confirmed, the estate must be administered in bankruptcy in the usual manner.

Thus a bankrupt's estate can be wound up in two ways, either by distribution in bankruptcy, or by distribution under a composition with creditors. Where a composition proposed by a bankrupt has been accepted by his creditors and approved by the Court, the bankrupt is thereby discharged only from the claims of the creditors whose names, addresses and debts are placed on the statement produced at the meeting of creditors. A creditor whose name did not appear in the statement of the debtor or otherwise in composition proceedings, and whose debt is not mentioned, is not bound thereby. A composition with creditors, when duly confirmed by the Court, operates as a discharge of the bankrupt. The acceptance of a composition from the principal debtor does not discharge any party collaterally liable for the same debt.

A bankrupt from whom a composition is received is necessarily at liberty to deal with his assets as he chooses, the result of a composition being that the legal title to the effects of the bankrupt remains in him.

To further protect creditors against fraud by the bankrupt, the law provides that after a composition has been confirmed,

it may be set aside and the case reinstated in bankruptcy, upon the application of parties in interest filed within six months after the composition has been confirmed. To obtain this privilege it must be made to appear that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

If a composition is set aside, title to the bankrupt's property reverts in the trustee and all property acquired by the bankrupt is applied in payment of debts contracted while the composition was in force. Everyone is restored to the rights and remedies which existed at the time the composition was confirmed.

When a Discharge in Bankruptcy will be Granted.

Having pointed out what constitutes bankruptcy, by and against whom petitions in bankruptcy may be filed together with the rights and duties of a bankrupt, we shall next inquire how a bankrupt may obtain his discharge.

At any time after one month, and not later than twelve months subsequent to being adjudged a bankrupt, the bankrupt may file an application for a discharge in the Court of Bankruptcy in which the proceedings are pending. If the bankrupt is unavoidably prevented from filing it within the time limited, such an application for discharge may be filed within, but not after the expiration of, the next six months.

The Court shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest. After investigating the merits of the application, the bankrupt will be discharged unless he has committed an offense punishable by imprisonment, or destroyed, concealed or failed to keep books of account or records from which his condition might be ascertained (with intent to conceal his true financial condition), or obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed or concealed any of his property with intent to defraud his creditors; or in voluntary proceedings been granted a discharge in bankruptcy within six years; or in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the Court.

To sustain an objection to a discharge on the ground of concealing property it must be shown that the concealment was by the bankrupt, while a bankrupt, from his trustee, of property

belonging to the estate in bankruptcy, and that such concealment was done knowingly and fraudulently.

The objection to a discharge on the ground that the bankrupt obtained property on credit on a false written statement of his financial condition, is an amendment made in 1903 to the original act of 1898. A man should not be entitled to be released from his indebtedness contracted upon his own false statements. The object of the bankruptcy law is to assist and protect honest traders, and the provisions of the act cannot be availed of to aid in the perpetration of fraud.

A man cannot become a voluntary bankrupt more than once in six years.

An application to revoke a discharge may be filed at any time within one year after a discharge has been granted. Such an application must be filed by a party in interest, and will be allowed upon proof of any fraud of which the bankrupt is guilty, and that the actual facts did not warrant the discharge.

Debts Affected by a Discharge.

A discharge in bankruptcy will release a bankrupt from all of his provable debts, with the following exceptions:

(1) Debts due for taxes levied by the United States, States, county, district or municipality in which the bankrupt resides.

(2) Debts which are liabilities for obtaining property by false pretenses, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance and support of wife or child, or for seduction of an unmarried female, or for criminal conversation.

(3) Debts which have not been duly scheduled in time for proof and allowance.

(4) Debts created by the bankrupt's fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary (trust) capacity.

Debts contracted subsequently to the filing of the petition in bankruptcy are not affected by a discharge.

The effect of a discharge in bankruptcy being merely to suspend the right of action against the debtor upon all provable debts not falling within the excepted classes, the debt nevertheless remains and the moral obligation to pay it forms a sufficient consideration for a new promise to make such payment. A discharge in bankruptcy relates back to the adjudication of the fact of bankruptcy, and a subsequent promise to pay a debt is not

required to be made after the discharge, but is sufficient if made between the adjudication and the discharge. The original debt, however, is revived only as of the date of the new promise, and where judgment is obtained upon the latter, the debtor is entitled to claim the exemption provided by the law in force at the latter date.

Process, Pleadings and Adjudications.

If a petition for involuntary bankruptcy is filed it must be served, with a writ of subpœna, upon the bankrupt, and if personal service cannot be made, then notice of the proceedings must be given by publication, which, unless otherwise ordered by the Court, must not be published more than once a week for two consecutive weeks.

The bankrupt or any creditor shall appear and plead to the petition within five days after the return day, and controvert the facts alleged in the petition. The Court shall then determine the issues presented by the pleadings and make the adjudication or dismiss the petition, as the facts shall warrant.

Upon filing a voluntary petition, the Court shall hear the same and either make the adjudication or dismiss the petition. If the Judge is absent from the district, or the division of the district in which the petition is filed, the Clerk of the Court shall forthwith refer the case to a referee.

An alleged bankrupt against whom an involuntary petition has been filed is entitled to have a trial by jury upon the question of his insolvency and any act of bankruptcy he is alleged to have committed.

A Court of Bankruptcy has the power, upon application of any officer, bankrupt or creditor to require any designated person, including the bankrupt and his wife, to appear in Court or before a referee and be examined concerning the acts, conduct or property of the bankrupt whose estate is in process of administration. A bankrupt's wife can only be examined upon facts concerning business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

Referees.

The twenty-second section of the act of 1898, provides that after a person has been adjudged a bankrupt, the Court may cause the trustee to proceed with the administration of the estate, or refer the case to a referee with either general or lim-

ited power to act upon the case and make a report. For the convenience of the parties, the Court may transfer a case from one referee to another. Under this section of the act, a bankrupt's estate may be administered under the direct supervision of the Judge and without an order of reference. In such a case a meeting of creditors would be called first, and after the election of the trustee, the case would proceed in the usual manner. Ordinarily, however, all cases are referred to a referee who is given general powers.

A Court of Bankruptcy shall within its territorial limits appoint referees, each for a term of two years. The qualifications of a referee are that he shall not hold any office of profit or emolument under the laws of the United States or of any State, other than Commissioner of Deeds, Justice of the Peace, master in chancery or notary public; he must not be related by consanguinity or affinity within the third degree as determined by the common law, to any of the Judges of the Courts of Bankruptcy or Circuit Courts of the United States, or of the Justices or Judges of the Appellate Courts of the districts wherein they may be appointed; they must be residents of and have their offices in the territorial districts for which they are to be appointed.

Referees within their districts are vested with authority to consider all petitions in bankruptcy referred to them and make the adjudications or dismiss the petitions, to administer oaths to and examine persons as witnesses, and require the production of documents to be used as evidence in proceedings before them; to perform such duties, except as to questions arising on applications of bankrupts for compositions with creditors and discharges as are imposed on Courts of Bankruptcy, and to authorize the employment of stenographers.

It shall be the duty of referees to declare dividends and to deliver to the trustees dividend sheets showing the dividends declared and to whom payable; to examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; to furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail to do so; make up records of the evidence given in contested matters arising before them, together with their findings, and submit same to the Courts; and whenever their

respective offices are in the same town or city, call upon the Clerk of the Court of Bankruptcy and obtain all papers filed in cases which have been referred to them.

Referees cannot act in cases in which they are directly or indirectly interested, practice as attorneys in any bankruptcy proceedings, or purchase, directly or indirectly, any property of an estate in bankruptcy.

Referees are entitled to be paid out of the bankrupt estate fifteen dollars in the first instance, twenty-five cents for every proof of claim filed for allowance, and one per cent. commission on all moneys disbursed to creditors by the trustee, or one-half of one per cent. on the amount to be paid to creditors upon the confirmation of a composition.

If in any proceeding before a referee a person shall disobey or resist any order, misbehave, neglect to produce any document when ordered to do so, or refuse to appear and take the oath of a witness and be examined, the referee shall report the fact to the Court and the guilty party may be punished for contempt of Court.

Trustees.

It is the function of the creditors of a bankrupt estate at their first meeting after the adjudication to appoint one or three trustees of such estates. Two trustees cannot be appointed. It must be either one or three. If the creditors fail to appoint a trustee or trustees the Court shall do so.

Any individual competent to perform the duties of trustee, residing in the same judicial district, may be appointed. Any corporation authorized by its charter to act as such may also be selected, provided it has an office in the judicial district in which it is appointed.

The duties of trustees are to account for and pay over to the estates under their control all interest received by them upon property of the bankrupt estate, to collect and reduce to money the property of the estates and close up the estate as quickly as possible; to deposit all money received by them in one of the designated depositories and to disburse same by check or draft; to furnish such information concerning the estates of which they are trustees as may be requested by parties in interest; to keep regular accounts showing all amounts received and from what sources, and the amounts expended by them and on what accounts; to submit before the final meeting of creditors detailed statements of the administration of the estates; to make final

reports and file final accounts with the Court fifteen days before the day fixed for the final meeting of the creditors; to pay dividends within ten days after they are declared by the referees; to report to the Court the condition of the estates and the amount of money on hand within the first month after their appointment and every two months thereafter; and to set apart the bankrupt's exemptions as soon as practicable after their appointment.

If three trustees are appointed, the concurrence of two is required to render valid any act concerning the administration of the estate. The compensation of trustees is fixed by the Courts upon a graduated scale, according to the value of the estate. The accounts and papers of trustees are open to inspection by the officers of the Court and all parties in interest. Both referees and trustees are required to furnish bonds, with two sufficient sureties, for the faithful performance of their official duties.

If a party is dissatisfied with the judgment rendered by a Court of Bankruptcy, an appeal may be taken to the United States Circuit Court of Appeals in the following cases: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment allowing or rejecting a debt or claim of \$500 or over; (3) from a judgment granting or denying a discharge. A further appeal may be had to the Supreme Court of the United States only in cases where the amount in controversy exceeds the sum of \$2,000 and the question involved is a constitutional one, or where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the bankruptcy law throughout the United States.

Arbitration of Controversies.

The law makes provision, in case of any controversy arising in the settlement of the estate, whereby the trustee may submit the same to arbitration. Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy and the third by the two thus chosen. If they fail to agree upon a third arbitrator within five days after their appointment, the Court shall appoint the third arbitrator.

The findings of the arbitrators or a majority of them, upon the questions in dispute, must be filed in Court and are given like force and effect as the verdict of a jury.

The trustee may compromise any controversy arising in the

administration of the estate upon such terms as he may deem for the best interests of the estate, but such compromises must be made with the approval of the Court.

Offenses.

As ignorance of the law is no defense, it is of advantage for everyone to understand what constitute offenses under the Bankruptcy Act, and the punishment therefor.

Upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee, a person shall be punished by imprisonment for a period not to exceed five years.

Upon conviction of any one of the five following offenses a person shall be punished by imprisonment for a period not to exceed two years, to wit: The offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustees any of the property belonging to his estate in bankruptcy; or made a false oath or account in any proceeding in bankruptcy; presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy or attorney; or received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

A referee shall forfeit his office and be a subject to a fine not exceeding five hundred dollars if he acts in a case in which he is directly or indirectly interested, or purchased directly or indirectly any property of the estate in bankruptcy of which he is referee, or refused to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of estates in his charge by parties in interest when directed by the Court so to do.

No person shall be prosecuted for any offense under the Bankruptcy Act unless the indictment is filed in Court within one year after the commission of the offense.

Meetings of Creditors.

As the majority of business men are interested as creditors of a bankrupt, it is important to emphasize the rights and priv-

ileges of such at the general meeting of the bankrupt's creditors.

As soon as a case has been referred to a referee it is his first duty to call for a meeting of all the creditors. The law provides that the first meeting of the creditors of a bankrupt shall be held not less than ten nor more than thirty days after the adjudication. The referee, or if there has been no referee, the Judge, must preside at all first meetings, who before proceeding with the other business may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the suggestion of any creditor. The following order of business is usually followed: (a) Call for and noting of those present in person or by attorney (one qualified to practice before the Circuit or District Court); (b) application for amendments; (c) allowance or disallowance of claims; (d) election of the trustee and fixing of the amount of his bond; (e) examination of the bankrupt; (f) miscellaneous motions, orders and instructions; (g) continuance of the meeting to a place, day and hour certain.

The order of business above indicated is frequently varied, the creditors having the right at each meeting to take such steps as may be necessary for the promotion of the best interests of the bankrupt estate.

Subsequent meetings of creditors may be held at any time and place when all the creditors who have secured the allowance of their claims sign a written consent to hold the same. The Court may also call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request therefor. Such request must be signed by a majority of such creditors in number and amount, and indicate a designated place, whereupon the Court shall call for such meeting within thirty days after the date of filing the request. As soon as the affairs of a bankrupt estate are ready to be closed a final meeting of creditors shall be ordered. The referee usually calls for creditors' meetings subsequent to the first upon a petition or motion made by the trustee. Every creditor has the absolute right to ten days' notice of all important steps taken in a case.

All matters raised at a creditors' meeting shall be decided by a majority vote in number and amount of claims of all creditors whose claims have been allowed and who are present. Those creditors who have secured claims or claims having priority shall not be entitled to a vote at a creditors' meeting. Such

claims shall not be counted in computing either the number of creditors or the amount of their claims. If the amounts of such claims exceed the values of the securities or priorities, the excess may be counted.

A member of a partnership or an officer of a corporation presenting a proof of debt should be allowed to vote.

A claim against a bankrupt estate must be proven in the manner prescribed by the bankruptcy law, and formal proof of a claim consists of a written statement under oath, signed by the creditor, and setting forth the claim, the consideration therefor, what securities are held therefor, and whether any payments have been made thereon. Proofs of debt must be filed with the referee.

If a claim is founded on a written instrument the same shall be filed with the proof of claim. All claims which have been duly proved shall be allowed.

Secured claims and those which have priority may be allowed to enable the creditors to participate in the first creditors' meeting prior to the determination of the value of their securities or priorities, but shall only be allowed for such sums as appear to be owing over and above the value of the securities and priorities. A secured creditor may surrender his security or not, as he chooses. If the security be surrendered, it inures to the benefit of all the creditors, and the claim, if otherwise objectionable, is allowed at the full amount. If a claimant is fully secured he should not be allowed to file a proof, and does not become a party to the proceeding. The claim of any creditor who has received any preference which is void or voidable under the provisions of the Bankruptcy Act, shall not be allowed, unless such creditor surrenders the preference. In other words, if a creditor, in a transaction occurring not more than four months before the bankruptcy, obtains an advantage over the other creditors through a conveyance, transfer or assignment, such creditor must surrender his advantage before his claim can be filed and allowed.

The value of a security shall be determined by converting the same into money according to the terms of the agreement pursuant to which such security was delivered to the creditor. Its value may also be determined by agreement, arbitration, compromise or litigation, as the Court shall direct. The value of the security when determined shall be credited upon the claim, and a dividend shall be paid only on the unpaid balance.

A reconsideration of an allowed claim may be obtained before the estate has been closed, and such claim will be either

realloved or rejected in whole or in part, according to the equities of the case. If a claim upon which a dividend has been paid is reconsidered and rejected the trustee may recover the amount of the dividend paid. Claims of one bankrupt estate against another may be proved and allowed the same as the claims of any other creditors. Claims cannot be filed in bankruptcy later than one year after the adjudication.

Notice to creditors must be given of every important step in a bankruptcy proceeding. Ten days' notice must be given of all examinations of the bankrupt, all proposed sales of property, the declaration and time of payment of dividends, the hearing upon applications for the confirmation of compositions or the discharge of bankrupts, the filing of the final accounts of the trustee, and the time and place when and where they will be passed upon.

Who May File and Dismiss Petitions.

The fifty-ninth section of the Federal Bankruptcy law regulates who may file and dismiss petitions. Those who may file voluntary petitions have been heretofore discussed. With reference to involuntary petitions, the law provides that three or more creditors who have provable claims against any person which amount in the aggregate to five hundred dollars or more in excess of the value of securities held by them, may file an involuntary petition to have such person adjudged a bankrupt. Furthermore, if all of the creditors of any person are less than twelve in number, then any one of such creditors whose claim amounts to five hundred dollars may file a petition to have him adjudged a bankrupt.

Involuntary petitions must be filed in duplicate, and if it is averred that the creditors of the bankrupt are less than twelve in number and less than three creditors have joined in the petition, an answer may be filed by the alleged bankrupt, setting out, under oath, the names and addresses of a larger number of creditors.

In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, any creditor employed by the bankrupt at the time of filing the petition, or related to him within the third degree, who has not joined in the petition, shall not be counted. A petitioning creditor cannot withdraw and thus reduce the number to less than three. A proceeding once begun must result in an adjudication or a dismissal.

Preferred Creditors.

A preference in relation to bankruptcy has been defined as a "conventional fraud," the debtor merely preferring to pay one creditor more than, or to the exclusion of others. If a bankrupt gives a preference and the person receiving it or to be benefited thereby, shall have had reasonable cause to believe that a preference was intended, it shall be voidable by the trustee, who may recover the property or its value from such person. For the purpose of such recovery, any Court of bankruptcy, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

The act provides that a preference is created if any person, being insolvent, has within four months before the filing of a petition in bankruptcy, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against him in favor of any person, or who has made a transfer of any of his property, the effect of the enforcement of such judgment or transfer being to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. It is further provided by amendment of 1903, that where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required.

The word transfer includes every mode of disposing of or parting with property, including the payment of money. Where the transfer does not diminish the general fund on hand for the benefit of all creditors, as where it consists of the giving of a fair security for a present loan, or the substitution of securities pledged to an old loan, no preference results. On the other hand, any transfer within the four months period named in the act by way of payment on or security of an antecedent debt, is a preference. A transfer of firm property in payment of an individual partner's debt is a preference, but the firm must be adjudged a bankrupt before a suit can be brought to avoid it.

Only a creditor can receive a preference. A transfer may be made to a third person and still be a preference if the creditor is benefited thereby. Where all the elements of a voidable preference exists, the trustee may recover the property, but if he refuses to sue, it has been held that a creditor may be permitted to do so for the benefit of all the other creditors.

If a creditor has been given a preference and subsequently gives the debtor credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable for him.

Frequently in contemplation of the filing of a petition in bankruptcy by or against him, a bankrupt will pay money or transfer property to his counsel. The law provides that if this be done the transaction may be re-examined by the Court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the Court, and the excess may be recovered by the trustee for the benefit of the estate.

Debts Which May be Proved.

It is important in order to have a practical knowledge of bankruptcy proceedings to understand clearly what constitutes a provable debt. If provable, a debt is the basis of its owner's right to a share in the bankrupt's estate; if probable, with certain exceptions stated in the statute, it is barred by the discharge. In the language of the statute:

"Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract expressed or implied; and (5) founded upon probable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

"Unliquidated claims against the bankrupt may, pursuant to

application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

In connection with the above quoted section the distinction must be noted between a debt which may be proved and a debt which may be allowed. Speaking generally, any claim on which an action in law or in equity might have been maintained may be proved, but whether or not a debt so proved will be allowed is quite another question. A provable debt is merely one which comes within a certain class of debts which may be presented and receive consideration. Its allowance depends upon the merits of the claim and the evidence in support of it.

Any liability which arises out of a contract is provable. Debts created by the fraud or embezzlement of the bankrupt are provable, but are not annulled by the bankrupt's discharge. An assignee of a creditor has a provable claim if his assignor had, even if the assignment is subsequent in date to the bankruptcy. A married woman may, in those States where their common law disabilities have been removed by statute, prove a debt against her husband's estate, although her claim is usually viewed with suspicion. To be provable a debt must be a fixed liability absolutely owing at the time the petition in bankruptcy is filed, regardless of the time of payment. For example, money owing under a contract for yearly employment may constitute a provable debt. A debt stipulated in a judgment note is not "absolutely owing," and is, therefore, not provable. Such debts as may be proved which are founded on a contract, express or implied, must be based upon a legal consideration, must not be against public policy, and, if a corporation, must not be *ultra vires*, i. e., the contract must be such as it has charter power to enter into.

If a liability arises not out of a contract, but in tort, i. e., the wrongdoing of another, such as negligence, personal assault and slander, etc., such liability must be liquidated or reduced to a definite amount before it can be proved as a claim against a bankrupt's estate.

Although it is still a controverted question, the weight of authority holds that a judgment for a fine cannot constitute a provable debt in bankruptcy. The criminal does not owe a fine, which is not a debt, but a punishment. Alimony in divorce cases is not a provable debt. It is subject to change by the order of the Court, and hence is not a fixed liability. A debt outlawed by the Statute of Limitation cannot be proved, since the debt could not be asserted before bankruptcy, and hence the law

prevents its proof against the other creditors, which if allowed would reduce their *pro rata* share.

Debts Which Have Priority.

A certain class of debts is given priority in bankruptcy. The law makes it the duty of the trustees to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors, and upon filing receipts from the proper public officers for such payment, he shall be credited with the amount thereof.

Debts having priority shall be paid in full out of the bankrupt's estate in the following order: (1) the necessary costs of preserving the estate subsequent to filing the petition in bankruptcy; (2) the filing fees paid by creditors in involuntary cases, and where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses, and one reasonable attorney's fee for services rendered to the petitioning creditors in involuntary cases, and to the bankrupt in voluntary cases; (4) wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or of the United States is entitled to priority.

After taxes to the government have been paid other debts must be settled in the order above set forth. And if there is not sufficient funds to pay all priority debts, the last class in order abates first.

INSURANCE.

*History and Development—Insurable Interest—Life Insurance—
The Application—The Policy—Accident Insurance—Fire In-
surance—The Company's Liability—Marine Insurance—
Barratry—General Average—Particular Average.*

EXPOSURE to serious casualties or accident, such as premature death or disability, fires and shipwrecks, constantly exists, and as it is impossible to prevent the happening of such events, it is of the greatest consequence to guard against the loss which their occurrence causes. This may be provided for by means of a general fund which is obtained by the imposition of a small contribution or premium upon all who are exposed to the common hazard, from which the few who suffer may be indemnified.

This system is what is known as insurance, its principal branches being life, accident, fire and marine, and the development of these branches of insurance has, among civilized people of modern times, assumed a vast and increasing importance. The four principal classes of insurance we will consider separately in the order named. There are several other branches of insurance, such as indemnity insurance against defaults or breaches of trust on the part of officers, trustees or employees, plate-glass insurance, insurance against boiler explosions, credit insurance, etc., which cannot be discussed in detail in a course of this kind, the general principles of which differ but slightly from those we will consider.

First Form of Insurance.

The first form of insurance developed was that of marine insurance, which has existed since the time of the early Roman emperors, the name of the insurance contract, called a "policy," being of Italian derivation. However, the rules or trade customs under which the business of insurance has grown up are based upon the "Usages of Lloyd's," which was originally a coffee house in London, where seafaring men and those engaged in maritime business congregated. In 1779 the Society of Lloyd's adopted a form of policy known as "Lloyd's Policy," which is the basis of the policies now in use in the United States.

Fire insurance as it is known to-day was practically unknown until after the great London fire of 1666.

The Equitable Assurance Society of London, organized in 1762, was the pioneer of the modern system of life insurance. The business of life insurance did not assume any great importance in the United States until after the Civil War, since when it has grown with unparalleled rapidity.

Various Kinds of Companies.

The business of insurance is transacted principally by corporations organized under general laws instead of special charters, which are divided into stock, mutual and mixed companies. A stock company has for its basis a capital stock, owned by stockholders who are quite distinct from the insured. The premium rates are lower than those of mixed or mutual companies, the profits over and above required accumulations and the liabilities of the company being divided in the shape of dividends among the stockholders.

Mutual companies have no stockholders, the insured themselves being members of the company, entitled to the management of its affairs, and to the receipt of any share of surplus premiums over and above the amount required for the payment of losses and expenses. In mixed companies, which partake of the nature of both stock and mutual companies, a certain proportion of the profits is paid to the stockholders and the remainder distributed among the insured.

In mutual companies premiums are frequently paid in whole or in part by notes of the insured, which the company holds, and from time to time assesses to pay losses and expenses.

Most States of the Union have established by law an insurance department for the better protection of the insured. Foreign insurance companies and domestic life insurance companies are required prior to commencing business to deposit money or equivalent securities, which are held as collateral by the department for the security of the insured. Stated reports must also be furnished the department indicating in detail the business affairs of the company making the report, and a certain reserve fund must be maintained to meet future liabilities.

In life insurance the premiums charged are based upon calculations made from mortality tables. These tables are tabulated exhibits of the number of survivors and the number of those dying each subsequent year among a given number of persons taken at various given ages. The mean or average

duration of life of an individual after any specified age, according to a given table of mortality, is called the expectation of life.

The Contract of Insurance.

The contract of insurance is founded on the principle of indemnity, with certain modifications hereinafter noted. It is detrimental to the public, as offering an inducement to the commission of crime, to permit the insured to gamble upon the event of death or the destruction of property. Consequently, in all branches of insurance, a binding contract cannot be made unless the insured has a pecuniary interest in the subject of insurance, i. e., the insured must be so situated with reference to the life or property that his gain of the policy money will be offset by his loss of the subject matter.

The policy in life insurance may be effected upon one's own life, upon the life of a near family relative or upon the life of a more distant relative or stranger to the blood. In the first case the temptation to suicide is not deemed fatal; in the second case, normal family affection is sufficient; but in the third class a pecuniary interest is always required. A distinction should therefore be made between insurance on one's own life or on the life of a near relative where no interest is required, and insurance upon the lives of others or upon property, where a real interest is always necessary.

The Courts have held that life insurance is not a contract of indemnity, but that property insurance is.

A policy of insurance is a property right and is consequently assignable. In view of the fact that death or the destruction of property must occur in order to realize its value, the right to assign a policy of insurance is restricted by the doctrine of insurable interest.

Insurable Interest.

As insurance is based upon the existence of an insurable interest on the part of the insured, it is necessary to define clearly what constitutes an insurable interest.

As applied to life insurance, one has an insurable interest in the life of another when there is a reasonable expectation of advantage or benefit from the continuance of the life of such other party. Every person has an insurable interest in his own life and health, or of anyone he depends upon, wholly or in part, for education and support; or of any person under legal obligation

to him for the payment of money, or of any person upon whose life any estate or interest which is vested in him depends. Thus, for example, a creditor has an insurable interest in the life of his debtor, a partner in the life of a co-partner, a woman in the life of her fiancé, a wife in the life of her husband, and it is important to note in this latter connection that the validity of the policy will survive a divorce. Where one takes out a policy of insurance on his own life and subsequently assigns it to one who has no insurable interest, but who continues to pay the premiums, the assignment is a wagering contract and hence void as being contrary to the policy of the law.

It being impossible to estimate exactly the interest which one has in his own life, it may be valued at any amount which the parties agree upon, which is the case of all insurance interests founded upon relationship. But if a creditor, however, takes out insurance upon the life of his debtor greatly in excess of the amount due, the transaction would be void as being, in reality, a wager.

The element of dependency must be coupled with relationship to furnish the basis for an insurable interest. To illustrate, an adult son has no insurable interest in the life of his father by virtue of the relationship, or a nephew in the life of an uncle, or (very fortunately) a son-in-law in the life of a mother-in-law.

In regard to fire insurance, the rule of insurable interest has been judicially stated as follows:

"Whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of the interest, an insurable interest would exist, whether the interest was an ownership in, or a right to the possession of the property, or simply an advantage of a pecuniary character having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest."

The same person may have different insurable interests in the same property, and different persons may have separate insurable interests in the same property. Where the insured is jointly interested with others, as, for instance, co-partners or trustees, or where he is intrusted with goods of other people, as in the case of a common carrier or warehouseman, he may either insure his own interest or his own liability in regard to the

property, or he may insure the property to its full value for the benefit of all concerned.

In marine insurance the same general principles respecting insurable interest are applicable as in fire insurance. The owner of a ship has an insurable interest in it at all times, even though it has been chartered by one who covenants to pay him its value in case of loss, and has also an insurable interest in expected freight which would have been earned were it not for the intervention of the peril insured against. One who loans money on bottomry may likewise insure his interest in the ship to the amount of his loan.

The insurable interest in fire and marine insurance must not only exist when the risk is assumed, but also at the time the loss occurs. In life insurance, however, it may cease any time after the contract is made. Thus a creditor who has taken out a policy on the life of his debtor, may at his death recover the full amount of the insurance, even though the debt has been paid previously. Life insurance for this reason is not a contract of strict indemnity, but is so governed by that doctrine as to prevent it from being a wagering contract at its inception. The rules of recovery in cases of fire and marine insurance differ in the event of partial loss of the property insured. In fire insurance the insured is entitled to recover his damages up to the amount of the policy. In marine insurance, where the value of the policy is not specifically fixed (which is seldom done), the insured can recover only such proportion of the amount insured as the loss bears to the value of the entire interest of the insured in the ship. For example, if a property is insured for \$10,000, which is worth \$20,000, and a loss of \$5,000 by fire occurs, the insured may recover his entire loss in full, but if a man has a marine policy for \$10,000 on a cargo worth \$20,000, and a loss of \$5,000 occurs, he will recover only \$2,500.

Insurance on property is in the nature of a personal contract and hence does not pass to the new owner by virtue of a transfer of the property. It is therefore necessary for one acquiring title to a property to take out new policies or have the proper indorsements consenting to the transfer made by the insurance company on the old policy.

If a person takes out a policy of insurance on his life and names another as beneficiary, the latter acquires a vested interest which cannot be interfered with by assignment or will without his consent, or some provision in the policy. If a husband names his wife as beneficiary and pays all the premiums with money

embezzled from his firm, the proceeds of the policy would belong to the firm, but if he paid the first premium with his own money and subsequent premiums with money embezzled from another, the value of the policy would be payable to his wife, but the defrauded party would have a lien upon the proceeds of the policy for the amount of money embezzled from him.

When the risk attaches, the insured under the usual form of policy becomes debtor to the insurer (the company) for the first premium. The relation of debtor does not exist, however, in regard to future premiums, the payment of which is merely made a condition, the performance of which is necessary in order to continue the contract. As a general rule, an interest in an insurance policy is not subject to attachment or execution, being what is known in law as a "chose in action."

With these brief observations upon insurance in general, it is hoped the reader will be better able to intelligently undertake the study of its separate branches, the first study of which will be life insurance.

It was pointed out in the preceding articles that public policy required every contract of life insurance to be supported by an insurable interest, which is such as would justify the reasonable expectation of advantage or benefit from the continuance of the life of the insured. Otherwise life insurance would be a mere wager on human life, which would instigate the grossest crimes. It has been held in Pennsylvania that where an insurable interest exists at the time life insurance is effected, the fact that the interest ceases to exist subsequently will not destroy any rights under the policy.

A husband has an insurable interest in the life of his wife, and *vice versa*; a parent in the life of a child and *vice versa*, and a creditor in the life of his debtor. But a brother or sister has not an insurable interest in the life of the other, nor a nephew in the life of his aunt or uncle, but circumstances may possibly exist which would take these cases out of the rule.

The doctrine of insurable interest is embodied in the statute law of Pennsylvania, the act of June 5, 1883, providing that when the payments on a policy of life insurance are made by any person other than the insured, the contract to be valid must be supported by an insurable interest; and shall be invalid when the beneficiary or assignee thereof is solely and only interested in the death of the insured. A man may, however, insure his own life and have the policy payable to another, provided he pays the premiums himself. If a man insures his life in the name of B,

reputed to be his wife, and after his death it appears that she is not his lawful wife, her right to the proceeds cannot be contested. If a policy is taken out by one who has an insurable interest, for the purpose of transferring it to one who has not such an interest, the assignee without interest has no right to the proceeds. An aunt who stands *in loco parentis* to a minor child, a nephew, may take out an industrial policy to the amount of \$190 on his life.

The Application.

The requisites which must be specified to make a valid policy are the names or description of the parties, the rate of premium, the life insured, the risks insured against, and the term or duration of the insurance.

The application constitutes an essential part of the contract of the insurance, and the insured is bound in making his application to disclose all facts that may be material to the risk. The contract of insurance is one requiring good faith between the parties, and fraudulent dealing at any stage, either before or after the issuance of the policy, is fatal to the rights of the party responsible. The party effecting the insurance must make truthful answers to all questions in the application, and is in duty bound to make a frank and honest disclosure of those circumstances which are likely to affect the insurer's estimate of the risk. If a person answers in the negative the question as to whether or not he was insured in any other company, or had made application for insurance and had been refused, and such answer is proved to be false, the policy will be held to be void.

Formerly it was held that any false warranty would invalidate a policy, but subsequent legislation in most States has remedied this defect by providing that whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation, or untrue statement relate to some matter material to the risk. It is further provided that whenever a wrong age has been given in good faith in an application for a policy of life insurance, the company shall not be required to pay the face value of the policy, but must pay such sum as the premium paid would have purchased at the applicant's real age at the time of effecting the insurance. It will,

therefore, be seen that only such untrue statements as are material to the risk will invalidate a contract of life insurance.

In connection with the application for life insurance, the distinction between a warranty and representation must be clearly understood. A warranty is a statement of fact or promise of performance, relating to the subject of insurance or to the risk, which must be literally true or strictly complied with, otherwise the contract may be avoided. A representation is in the nature of a collateral inducement to the contract, and it is an agreement that the fact stated is true, but only such a statement as will constitute a misrepresentation, if it be untrue. A material misrepresentation of fact, whether intentional or unintentional, will void the contract.

Whether a statement shall be taken as a warranty is a question of interpretation to be ascertained as in other contracts, but the rule seems to be that such representations are warranties when it is apparent that they had in themselves or in view of the parties a tendency to induce the insurer to enter into the contract on more favorable terms.

The answer in the application that the "health is good" means that the one who seeks insurance is free from any ailment that seriously affects his general soundness and healthfulness. A representation that the applicant is a single man will avoid a policy if the applicant be married. It is also material to the risk assumed that the occupation of the applicant be correctly stated. If an applicant is addicted to habitual excessive indulgence in liquor and states in the application that he is temperate in the use of intoxicating liquors, the policy may be avoided. If, however, the insured was a temperate man at the time the policy of insurance was granted, the fact that he subsequently contracted the habit of excessive drinking and died of delirium tremens will not prevent the beneficiary from recovering the value of the policy.

The contract of insurance is made in the same manner as any other contract, i. e., by offer and acceptance. The application constitutes the offer, the issuing of the policy, the acceptance, and the contract is completed by delivery of the policy.

The parties to a contract of life insurance are (1) the insurer, who may be any person competent to assume the risk, or any corporation authorized by law to engage in such business, and who becomes obligated to pay a certain sum to another in the event of the death of a certain named person; (2) the insured, which term applies to two different persons, (a) the insured may be the person upon whose death the amount of insurance

money must be paid, or (b) the person who pays the premiums may be the insured; and (3) the beneficiary, who is the party to whom the insurance money must be paid upon the death of the insured.

The Consideration for the Policy.

The premium to be paid is the consideration for issuing the policy. The premium is regulated by the amount of insurance, the age, occupation, habits and sex of the insured. Ordinarily payment of the premium must be made before the risk attaches. The payment of the premium, delivery of the policy and subsequent assumption of the risk are usually coincident. Premiums may be paid in either cash or by promissory notes. Where the insurance company accepts the promissory note of the insured for the first premium, the policy containing a recital of the payment of the premium, but the note, of even date therewith, providing that non-payment thereof shall void the policy, the note modifies the contract contained in the policy, and no recovery can be had upon the latter, if the note is not paid at maturity.

Most policies stipulate a forfeiture of all rights under it upon default of payments of the premiums, but a policy cannot be forfeited for non-payment of premiums where there is no provision in the policy to this effect. Furthermore, a policy cannot be forfeited where the insurer (the company) has in its possession dividends belonging to the policyholder more than enough to pay the premium. Profits earned and not declared as dividends cannot be treated as funds in the hands of the insurance company to be applied to the payment of a premium.

Where a life insurance policy provides that premiums shall be paid quarterly, on certain dates, or within thirty days thereafter, during the continuance of the policy, the company is liable, where the insured dies within thirty days, but before the payment of the premium, which is paid prior to the expiration of such time, the fact that the insured was unable by reason of sickness to pay a premium when due will not prevent a forfeiture.

If the insured has been in default in the payment of premiums for a considerable length of time, the default cannot be excused by showing that the company failed to give notice of the fact that the premium was due in accordance with its usual custom, since in such case the default cannot be attributed to the misleading effect of the company's course of business.

Forfeiture, however, is odious to the law and cannot be

enforced if the company in any way waived its right to collect the premiums at the time named. It has consequently been held that the company has waived prompt payment of premiums and hence cannot declare a forfeiture of the policy if it has adopted a custom of accepting premiums thirty or sixty days after due. It is not a waiver if the company fails to observe its custom by sending notices when premiums are payable.

Payment of a premium by the insured to a person expressly or impliedly authorized to receive same is a payment to the company.

When a life insurance policy provides that on failure to pay a premium when due, and in the lifetime of the insured, the policy shall be void, and further provides that no person except the president and secretary of the company, acting together, shall have authority to alter the contract or waive a forfeiture, a general agent of the company has no authority to receive overdue premiums after the death of the insured, unless the company has expressly or impliedly given him such authority. This authority will not be implied from the fact that said agent had been in the habit of receiving and in fact had authority to receive premiums and deliver renewal receipts after maturity where the insured was at the time in good health. The insured cannot set up as an excuse that he had agreed with an agent of the company that the latter should credit the premium on a debt the agent owed to the insured.

Mere silence will not give consent to a request by the insured for a renewal of the policy. A renewal receipt which purports to renew an expired policy is admissible as evidence of a contract for such renewal.

The life insured is the subject matter of the contract of life insurance, and certain restrictions are usually imposed by the insurance company upon the life so insured, principal among which are those relating to travel, occupation, military and naval service and manner of death. With reference to restriction upon occupation, engaging in the manufacture of gunpowder or dangerous chemicals, or becoming a fireman, locomotive engineer or miner, will defeat recovery if death occurs while following such occupation stipulated against. As some occupations are more hazardous than others, certain companies provide in their policies that the insured shall not change his occupation without the company's knowledge and consent.

It is a general condition of life insurance policies that the insured shall not enter the military and naval service without the

consent of the insurance company. If this restriction is violated the policy may be avoided. Too much stress cannot be laid upon the necessity of carefully reading the policy and becoming familiar with its terms and strictly complying therewith. Oversight in this regard is frequently fatal. The answers to the application should be truthful, the premiums promptly paid, care being taken to make payment to that agent of the company within the scope of whose employment it is to accept such premiums, and conditions as to notifying company of change in occupation, foreign residence, etc., complied with.

The principal restrictions upon the manner of death are that it must not occur in violation of law, by suicide or duel. The policy will be void if the insured meets with death while engaged in the perpetration of an unlawful act, such as burglary. If the insured has committed murder for which he is hanged, the policy will be void. A policy will also become void if the insured dies as a result of a criminal operation or attempted abortion.

If a policy of life insurance which is silent as to suicide by the insured is made payable to one who has an insurable interest in the life of the insured, suicide by the insured will not defeat a recovery upon the policy. But it has been held (although some doubt still exists) that where the policy is payable to the estate of the insured, suicide will prevent any recovery on the policy by his personal representatives, although there is no stipulation against it.

A stipulation against suicide does not avoid the policy where nothing is said as to sanity or insanity of the insured at the time of the suicide, unless the insured is possessed of sufficient mental capacity to form an intelligent intent to take his life. It has been held that if the insured committed suicide while insane, and the policy was silent as to the sanity or insanity of the insured, the company is liable, even though the insured intended to take his life and knew that death would be the result of his act. If the policy contains the condition that the policy shall become void if the insured takes his own life, while sane or insane, no recovery can be had, if the insured commits suicide while insane. A policy providing for a forfeiture in case the insured shall, by any unlawful act, take his own life, is not forfeited where the insured, while trespassing on a train of cars, is thrown under the wheels and killed. Where death may be the result of either accident or suicide, the presumption is always against suicide.

By the act of April 15, 1868, it is provided that all policies

of life insurance or annuities upon the life of any person which are taken out for the benefit of, or which have been assigned to the wife or children, or any relative dependent upon such person, shall be vested in such wife, children or other relative, full and clear from all claims of the creditors of such person. By the terms of this act any one who makes provision for his wife for her benefit, vests a good title in his wife, notwithstanding the claims of the creditors of the insured. The question of good faith or fraud upon the rights of such creditors cannot be raised. By the later act of May 1, 1876, it is provided that if the premium is paid by any person with intent to defraud his creditors, an amount only equal to the premium so paid, with interest thereon shall inure to their benefit. It is a general rule of law that a policy of insurance must be construed most strongly against the insurer (the company). Consequently where any doubt exists as to the meaning of the policy, or where it is capable of two interpretations, each equally reasonable, that one must be adopted which is most favorable to the insured. Where the written and printed portion of a policy conflict the latter must yield to the former.

Assignment.

The beneficiary may assign a policy of life insurance, but this should be done with the knowledge and consent of the insurer, and must be made to one who has an insurable interest in the life insured, either as creditor, surety or relative by blood or marriage. The insured has no right to assign the policy unless he be the beneficiary and pay the premiums. There may be a valid assignment of a life insurance policy by gift (by mere delivery thereof to the donor), without assignment or indorsement in writing. Delivery, however, is essential where there is no consideration, even though the assignment be in writing under seal. To illustrate: Where the insured places his policy in a sealed envelope, addressed to a person to whom it is delivered after the death of the insured, together with an assignment in trust for the insured's children, and neither the trustee nor the children have any knowledge of the transaction, and the envelope remains in the insured's possession, there is no valid gift. Where an assignment is inoperative, such as for want of delivery, it may, nevertheless, take effect as a direction, given at the time the policy was issued, to pay the insurance to the assignee, where it appears that the assignment was executed before the policy was taken

from the insurer's office, and that a copy of it was filed with the company.

Where the subscribing witness to an assignment of a life insurance policy, executed by the insured to his wife and children, attests its sealing and delivery, and the wife dies before the husband, the fact that the policy and the assignment are found among his papers at his death, would not be sufficient to overcome the presumption that the assignment was delivered. If proof is given that a life insurance policy was taken out, expressed to be for the benefit of the insured's intended wife, but which for motives of delicacy on her part, was made payable to his legal representative, and which after their marriage was acknowledged as the wife's, but was placed in a box containing their common papers and deposited in the wife's trunk, it would be held sufficient evidence as against the husband's relatives, to prove a gift to the wife. If a man takes out a policy on his own life for the benefit of a child, this constitutes a gift of the policy to such child, although the policy remains in the possession of the insured.

The payment of premiums by a creditor on his debtor's life insurance, and the fact that the premium receipt book is in his possession, do not amount to an assignment of the policy and will not give the creditor any interest therein.

The insurance company has the right to choose the persons with whom it will contract, and a stipulation in the policy that it shall not be transferred without the consent of the insurer is merely the exercise of that right, and its validity is undoubted.

Where the beneficiary has assigned his interest in a policy to a creditor, the fact that the assignment was not approved by the company before the death of the insured cannot be set up in defense, the requirement of approval being intended solely for the benefit of the company. The assignment of a policy in compliance with the regulations of the company, does not constitute a new insurance, and questions as to the necessity of a full disclosure of facts apply to the issuing of the policy and not to the assignment. Where a woman took out a policy on her life, payable to her executors, and afterwards gave it to her daughter-in-law with instructions to pay the premiums, pay the insured's funeral expenses, and if anything was left to give it to the granddaughter of the insured, it was held that the failure to disclose this arrangement did not amount to a fraud on the insurer.

A stipulation in a policy that in case of an assignment the assignee shall be liable for the unpaid premium, is merely a

personal contract, and gives the insurance company no right of action against the assignee. Where an assignment is made for the purpose of securing a creditor, the assignee, although entitled to receive the face value of the policy can hold only such amount as is necessary for his indemnity. The legal representatives of the debtor will be entitled to the balance.

Cancellation.

A contract of insurance, like any other, requires the consent of both parties to cancel or rescind it, unless by its own terms a right to do so is given to either party alone, and if such right is given upon conditions, they must be fully complied with before the right can be exercised.

Where a policy of life insurance is unlawfully forfeited by the insurance company for non-payment of premiums, the insured may recover back the premiums paid by him on the policy while it was in force, with interest from the time of demand. The fact that the risk had attached, and had been carried during the time the premiums were paid, is no defense. Where a company, not knowing that a policy made payable to the insured or to any other person appearing to be equitably entitled was in reality for the benefit of a creditor, by whom the premium was paid, arbitrarily canceled the policy, and retained the premiums, it was held that the creditor had a right of action to recover the premiums paid by him. A contract of insurance cannot be canceled without notice to the insured.

Notice and Proof of Death.

The terms of the policy determine when it falls due, and the amount of the insurance is usually payable within a certain time mentioned in the policy after the death of the insured. This time is generally sixty or ninety days after notice and proof of death. The notice and proof of death must be made in strict compliance with the requirements of the policy, which usually prescribes certain formalities and a course of procedure. Where a policy does not require notice of the death of the insured to be given to the company there is nothing in the nature of the contract requiring such notice or demand before bringing suit. Proof of death made on a blank certificate furnished by the company, stating that the claimant believed from all the circumstances that the insured was murdered, giving the place at which the murder was supposed to have been committed, and the date,

has been held sufficient. If a company has issued two policies upon the life of the same person, both calling for the same mode of proof of death, and upon the decease of the insured the company accepts without objection proofs of death under one policy, the representatives of the insured are not bound, in the absence of a special contract to that effect, to furnish further proofs of loss under the second policy. If an officer of an insurance company states that the company will not pay a loss, it constitutes a waiver of a proof of death.

Discriminations Prohibited.

As a protection to the public, the Legislature of Pennsylvania enacted a law (May 7, 1889, amended July 2, 1895), providing that no life insurance company doing business in Pennsylvania shall make or permit any distinction or discrimination in favor of individuals, between insurants of the same class and equal expectations of life, in the amounts or payments of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract made by it. A company or any agent thereof is also prohibited from making any contract other than is plainly expressed in the policy issued thereon, nor shall any insurance company or agent pay, or the insured receive, any rebate of premium payable on the policy as an inducement to the insurance, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement not set forth in the contract of insurance. The obvious purpose of this law is to preserve the security to which all policyholders are entitled by preventing secret rebates or special privileges to the few, which would impair the value of the security. Violation of this law is a misdemeanor.

Accident Insurance.

Certain general principles with reference to insurable interest, duty of full disclosure, etc., are applicable to all forms of insurance and it will be unnecessary in taking up the several branches of insurance to reiterate what has been discussed heretofore. There are, however, certain features peculiar to each form of insurance which it is essential to emphasize.

Accident insurance is a branch of life insurance, which protects against loss caused by accident, whether occasioned by a

bodily disability or fortuitous death. In common parlance an accident means any unfortunate happening, but in a legal sense it means any unexpected event which happens as by chance, or which does not take place according to the usual course of events. An injury is not accidental if it happened through the concurrence of the will or intent of the insured. An accidental injury may, however, be the result of the intentional act of the insured, provided the result could not have been foreseen. For example, an injury to the insured caused by intentionally jumping from the platform of a train of cars under such excusable circumstances that no harm could have reasonably been expected to follow would be accidental and entitle the insured to recover. Likewise the unintentional taking of poison, the sprain of one's ankle by lifting heavy weights, etc.

The usual accident insurance policy protects the insured from injuries or disabilities caused by "external, violent and accidental means." The policy usually prescribes the nature of the accident for which recovery may be had, in which event there can be no recovery for accidents of a different nature than those stipulated.

Unless expressly excluded by the terms of the policy, an accident covers an injury intentionally inflicted upon the insured by another, as, for example, in an affray or fight. If, on the other hand, such an injury is excluded, the restriction of the contract will prevail.

A sunstroke, when not expressly excluded from the operation of the policy, is generally considered to be a disease rather than an accident. Accidental injury is a phrase of such broad scope that its application has been limited by many restrictive provisions, differing somewhat in the forms of policies adopted by the different companies. A policy of accident insurance is a contract providing for the payment to the insured of a specified sum per week (regulated by the amount of insurance), during disability resulting from bodily injuries effected through external, violent and accidental means, which shall, independently of all other causes, immediately and wholly disable the insured from transacting any and every kind of business pertaining to his occupation. The ordinary accident policy also provides for the payment of a certain sum in case of loss by severance of one entire hand or foot, etc., or if death results from such injuries within ninety days. The application should be carefully read, answers truthfully made, premiums promptly paid and other conditions strictly complied with.

Construction of Terms in Accident Policies.

Death by accidental drowning has been construed to be by "external, violent and accidental" means, although the cause is internal.

The provision that the injury insured against must be effected by the means specified, "independently of all other causes" is so unreasonable, indefinite and repugnant to the main purpose of the contract that it has been construed by the Courts very strictly against the insurance companies. Thus in a policy which excepted as a risk death resulting from fits, the insurance will be held to cover a case where the insured was seized with a fit and fell under the wheels of a locomotive and was killed. If from a shot in the back the insured has paralysis of the feet, it will be held to be a loss of "two entire feet." The Courts have also held that death caused by fright was an accident and within the protection of a policy, although this is rather an extreme case.

The disability covered by the policy must result within a reasonable time after the injury, the word "immediately" not requiring the disability to be instantaneous. The disability must, however, be total; but the fact that the insured is able to perform certain portions of his accustomed work does not prevent the disability from being construed as total. The occupation of the insured is always considered in this connection.

The term "occupation" has reference to the usual or regular calling or profession, and not to accidental acts and duties. An accidental engagement in work involving greater risk will not avoid the policy, unless such occupation is specially excepted.

Injuries resulting from violation of the law are not covered by an accident insurance policy. Most accident policies contain a stipulation that no claim shall be valid where injury or death result from voluntary exposure to unnecessary danger or perilous adventure. Voluntary exposure is held by the law to mean intentional exposure, and a provision will not prevent a recovery in a case where the act is voluntary, but the danger unforeseen. If reasonable or ordinary prudence would pronounce an exposure dangerous, the insured cannot recover, and whether or not such an exposure was made is a matter of fact for a jury to determine under the circumstances. Injury or death resulting from disease or medical treatment are excepted risks for which no recovery can be had in most accident policies.

If medical treatment is necessary as the natural consequence of an accidental injury, such as a surgical operation, and the

insured should die, the company cannot avoid its liability under the policy on the ground that death resulted from medical treatment. The insured is given the benefit of the doubt.

Where a policy provides that the company shall not be liable for injuries to the insured received while intoxicated, such provision covers all cases where the insured is so far under the influence of intoxicants as to be unable to properly take care of his personal safety, irrespective of the actual cause of the injury or the degree of the drunkenness.

Most companies except as a risk accidents happening while walking or being on the bed or roadway of a railroad, or while riding on the platform or of getting on or off a railroad car. The Supreme Court of Pennsylvania has held that an accident caused by the insured stepping off a railroad train at night would not be included in such exception, and it is also the law of Pennsylvania that the insured would not be prevented from recovering if he was injured while crossing a track, if he took all due precautions. However, if the insured is killed while walking on the roadbed between the tracks, when he might have used a sidewalk, the exception applies.

Most policies will not protect against the voluntary or involuntary taking of poison. In such cases the courts have limited the scope of this clause to the internal reception of a poisonous substance. Hence death due to the external contact with an unknown poisonous substance would be an accident which would justify recovery under the policy.

Policies insuring against injuries while riding as a passenger in or on a public conveyance cover injuries received while in the actual prosecution of a journey, whether insured was at the time in a conveyance for transportation of passengers or not. Generally speaking walking cannot be held to be "traveling by public or private conveyance," but the Supreme Court of the United States has held that under such a policy the insured could recover from an injury received by a fall on a sidewalk when walking from a steamboat landing to a railway station, this walk being usual for travelers on that route, although the insured might have ridden in a hack.

Notice or Proof of Injury or Death.

Notice and proof of injury or death is required by all policies to be promptly given, the time limit varying in different companies. Where the circumstances of the accident are such as to

render it impossible to comply with the conditions as to notice and proof, giving notice within a reasonable time after it becomes possible to do so has been held sufficient.

The holder of an accident policy should promptly notify the company of any change in employment and should avoid voluntary exposure to danger, trespassing on railroads and intoxication; he should also promptly notify the company of any accident. Non-observance of these precautions will forfeit the policy.

Fire Insurance.

A contract of fire insurance is a contract to indemnify the insured for a specified period against loss or damage to his property caused by fire. Such a contract of fire insurance must have all the elements of an ordinary contract. It is provided by statute in Pennsylvania that only companies incorporated for the purpose can execute a policy of fire insurance.

As in other forms of insurance, so in fire insurance, the insured must have an insurable interest in the subject matter of the insurance. An insurance on property is not an insurance of the specific thing without regard to ownership, but is a special agreement of indemnity with the person, insuring him against such loss or damage as he may sustain, and no recovery can be had where the insured has parted with his ownership. It may be stated as a general rule of law that any direct pecuniary interest in the property insured, which may be injured by the occurrence of the risk insured against, constitutes an insurable interest. The holder of either legal or equitable title in property has such an interest, and in case of a loss, a trustee may recover the full amount of the policy. If the insured took out his insurance in good faith, under a reasonable belief that he had title, his want of title would not be a defense to an action on a policy. A stockholder has no insurable interest in the property of a corporation. An insurable interest must be capable of enforcement in law or equity, and it has therefore been held that a turnpike company has no insurable interest in a public county bridge on the line of its road, but free to all travel, even though the company voluntarily contributed to the cost of the erection and maintenance of the bridge.

An applicant for fire insurance should set forth the amount of his interest in the property to be covered, and should make a full and accurate disclosure of all facts affecting the risk assumed. But unless the insured has knowledge that a particular fact will

increase the risk, he is not bound to report such fact to the company, although there is a warranty in the policy that the insured has not omitted to state information material to the risk.

The premium paid is the consideration for the policy of fire insurance, which should be certain in amount and based upon a proportionate rate of the value at risk and the probabilities of loss by fire.

In fire insurance the risk is the contingency upon the happening of which the liability of the insurer attaches. Loss by fire means the result of the ignition of the property insured. To illustrate, where sugar was spoiled by great heat from a fire, the insurance company was held not liable, and likewise where the heat of the sun contracted timber without any actual fire. Fire originating in spontaneous combustion is within the risk. Damage caused by concussion caused by an explosion of gunpowder in another building is not within the risk. The ordinary fire insurance policy includes loss by the incendiary act of the insured if insane, and also includes the unintentional or careless acts of third persons, whether his agents or not. If, however, the fire is caused by the wilful act of the insured himself, or of some one acting with his consent or knowledge, the insurer will, of course, be exonerated. Arson by the wife of the insured without his connivance would be no defense to the company.

The duration of the risk is limited by the terms of the policy, the risk commencing as soon as the policy is executed. A fire insurance policy is said to be executed when the application of the party seeking protection is accepted by the company and a policy delivered in accordance therewith. The date of the contract of insurance is usually the date of the policy. It has been held that the risk commences as soon as the offer is accepted, even if the premium has not been paid and the policy not delivered.

The policy usually sets forth the amount of the insurance, which, as a general rule, is three-fourths or two-thirds of the value of the property.

Excepted Risks.

The ordinary fire insurance policy usually excepts certain risks from those protected against, the most common of which is loss caused directly or indirectly by invasion, insurrection, riot, civil war or military or usurped power, or by order of any civil authority. In such cases the company will not be liable. The

company shall not be liable for loss caused by the neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises. A policy of insurance against loss or damage by fire does not include a loss caused by removing goods from a store at a time when nearby buildings were on fire, when, as a matter of fact, the building containing the insured goods was not injured by the fire, though the insured supposed they would be. Goods stolen during a fire cannot be included in the loss recoverable on the policy.

As considerable damage is often caused by explosions, and fire frequently follows explosions, it is difficult to distinguish between the loss caused by the explosion and the loss caused by fire. For the latter the company will be liable; for the former it will not. The average policy excepts as a risk loss by explosion of any kind or lightning (unless fire ensues, and, in that event, for the damage by fire only). Liability for direct damage by lightning may be assumed by specific agreement, however. The company will be liable for loss caused by fire originating from the explosion of a lamp on the insured premises, and where the insured property was blown up with gunpowder for purposes of safety would not relieve the insurance company from liability, even though the policy excepted from its operation a loss by the explosion of gunpowder.

If a building or any part thereof fall, except as the result of a fire, all insurance on such building or its contents ceases. An insurance company is not liable for loss of accounts, bills, currency, deeds, evidences of debt, money, notes or securities. If such property were covered by the policy the insurers would be subjected to claims of uncertain amount and very difficult of verification. If a loss by fire is admitted, the burden of proof is on the company claiming exemption from liability to show that it falls within the exceptions.

Description and Location of Property.

It is necessary that the property insured be accurately described, but where the agent of an insurance company, with a full knowledge of the character of the property, fills up the application, the insured is not responsible for an erroneous description. It is also necessary that the location of the property be stated accurately. Place is ordinarily material to the contract and of the very essence of the risk, and a change of locality with-

out the consent of the company removes the goods from the protection of the policy, though it contains no special provision to that effect. If consent to removal is obtained goods are not protected in transit unless the policy so provides.

Adjustment of Loss.

In case of fire, whether the loss be partial or total, the general rule of damages is that the insurer is bound to pay only so much as will indemnify the insured. In other words the company is not liable beyond the actual cash value of the property at the time of loss, with proper deduction for depreciation, however caused. This rule excludes remote damages, such as loss from interruption of business, prospective rent or profit, etc. The difference between the actual cash value of the property just before the fire and its value after the fire is the measure of indemnity where the property has been injured and not destroyed. The insured has the right to be indemnified not only for loss by fire, but also for all losses that are the immediate results of the fire. Upon the occurrence of a loss it is the duty of the insured to give to the company (the insurer) proof and notice of the loss, which should be certified to upon oath. In making proof of loss, all the terms and conditions of the policy should be strictly and literally complied with.

Causes Rendering Policy Void.

The standard fire policy provides that it shall be void (unless otherwise provided by agreement indorsed upon or added to the policy), if the insured "has or shall hereafter make or procure any other contract of insurance whether valid or not, on property covered in whole or in part by the policy." This has been held to be a reasonable regulation, and the requirement to give notice of any other insurance upon the same property is applicable to subsequent as well as pre-existing insurance.

Unless special provision be made to the contrary, the entire policy shall be void if the subject of insurance be a manufacturing establishment and if it be operated in whole or in part at night later than ten o'clock, or if it ceases to be operated for more than ten consecutive days. Where, however, a company deliberately insures an idle establishment, knowing the extent of the hazard, the above proviso will not prevent recovery.

The entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured.

This provision is intended to protect the property from fire, by change in structure, methods of heating, addition of new out-buildings and the like. The temporary use of benzine in an insured building for the purpose of cleansing furniture is not within a condition against increase of risk by any means within the power of the insured, although the loss results from the use of the benzine. It is a good precaution to notify the company of any facts increasing the risk and obtain the written consent of the secretary to a continuance of the policy. It has been held by the Supreme Court of Pennsylvania that if a risk is increased contrary to the provisions of a policy, the company is absolved from the contract although the fire does not result from the increase of risk. A decrease of risk by removal of a building from the insured premises cannot be set off against an increase of risk in violation of a condition in the policy.

It is ordinarily provided that the entire policy shall be void if mechanics be employed in building, altering or repairing the property covered by the insurance for more than fifteen days at any one time.

The entire policy shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if with the knowledge of the insured, foreclosure proceedings be commenced or notice of sale of any property covered by the policy by virtue of any mortgage or trust deed be given, or if any change, other than the death of the insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of insured or otherwise.

A clause in a fire policy providing that it shall be void if the property insured be levied upon or taken into possession under legal process is not broken by a merely technical levy, without any actual seizure or change of possession of the goods or land. Nor is such a condition broken by the entry of judgment on a bond accompanying a mortgage and the levying of execution on the property, where the loss occurs before the sheriff's sale.

With reference to the "entire, unconditional and sole ownership" of the property insured, this requirement is not broken by executing a bill of sale of personal property, either before or after the issuance of a policy of insurance thereon, where the

bill of sale is executed for money lent and the insured retains exclusive possession of the property. Hence a bill of sale given to a money loan company would not be a breach of this condition if the borrower retained possession of the goods. The condition as to "unconditional and sole ownership" relates to the ownership of the property at the date of the issuance of the policy, and not at the date when the loss occurs.

In regard to the conditions against the transfer of the property insured, if a policy contains such a condition and the property insured be sold or transferred without the consent of the company, the right to recover on the policy will be lost without any act of forfeiture by the company. Notice to the company of an assignment of the policy is not notice of a transfer of the insured property. An assignment in bankruptcy of the property insured is not a transfer within the meaning of the condition under consideration.

A policy of fire insurance is in the nature of a personal contract between the insured and the insurer, and the insured cannot transfer the policy to any third person without the express consent of the insured.

If a policy be assigned before the loss occurs without the consent of the company indorsed thereon, it will be void and without effect, but this rule does not apply to an assignment of an interest in a policy of fire insurance after the loss occurs. Such an assignment is good even if the insurer had no knowledge of or consented to the same. The receipt of premiums for several years by the treasurer or manager of a fire insurance company, with the knowledge of transfer of the property and policy without the approval of the company, will estop (prevent) the company from setting up a forfeiture of the policy by reason of such transfer. Any condition prohibiting the assignment of the policy after a loss, or any claim arising under it without the consent of the company, is void.

A fire insurance company cannot refuse to approve the assignment of a perpetual policy to one who has become the owner of the insured property, provided the assignee is a person whose financial condition, habits of life and moral character are such as do not increase the hazard of loss. For this reason a company could refuse to approve an assignment of a perpetual fire policy to one who has been convicted of arson or incendiarism. If a company should wrongfully refuse to approve a transfer, the assignee can bring an action for damages in his own name and

may recover the cost of procuring perpetual insurance for the same amount.

The company has a right to know whether the subject of insurance is receiving ordinary supervision or is being neglected. If the property insured is a dwelling it must have an occupant living in it. In the case of other property it must have that kind of care and superintendence which naturally belongs to the character of the occupancy and property described in the policy. Consequently a condition is made in many policies that if the building insured, whether intended for occupancy by owner or tenant, becomes vacant or unoccupied and so remains for ten days, the company shall not be liable for loss. This vacancy clause is construed in view of the situation and character of the property insured.

The entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstances concerning the insurance or the subject thereof, or if the interest of the insured in the property be not truthfully stated, or in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, either before or after the loss.

It is the duty of the insured immediately upon the occurrence of a fire to notify promptly the company in writing of any loss sustained thereby. Strict attention should be given to the requirements of the contract in this regard, to limit the loss so far as it is possible to do so, and to give an opportunity to the company to take such measures with promptness as may seem wise to them to effect the same result. The insured must furnish the company with all reasonable evidence to enable it to determine the nature and extent of the loss. A proper mailing of a notice of loss is a sufficient compliance with the requirement of the policy that immediate notice of loss must be given in writing.

The requirement of furnishing notice of loss by fire is regulated in Pennsylvania by the act of June 27, 1883, which provides that when any property shall be destroyed by fire in this Commonwealth, which is covered by fire insurance, the conditions of the contract as to the notice of loss and the furnishing of preliminary proofs shall be deemed to have been complied with if the insured or his assignee shall furnish the company at its general office, or to the agent of the company who countersigned the policy of insurance, the notice of loss within ten days from the date of the fire, and the preliminary proofs within twenty days from said date. In case the agent who countersigned the policy

of insurance shall have been removed or succeeded by some other agent of the company after such policy was written and prior to the date of the fire, then the notice and preliminary proofs may be served on any other agent of the company authorized to effect contracts of insurance and countersign policies of any such insurance companies.

Where a policy of fire insurance stipulates that the insured shall furnish a particular statement of the loss, in the absence of such proof or waiver thereof the insured cannot recover. When there is a stipulation that the insured shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals are lost, there can be no recovery on the policy unless the proofs have been furnished, or it is shown that the insured has made every effort to furnish them. The fact that the insured becomes insane about the time his property is burned does not render unnecessary a compliance with the condition of the policy requiring specific proofs of loss.

A contract of insurance, which by its terms is entire, will not be forfeited as to all property covered, on account of failure of proofs as to part of the property, unless so provided in the policy. A provision in a policy prescribing the time within which a notice of loss is to be given, will not be construed as a cause of forfeiture, unless so stipulated in the policy, and where a policy provides that notice of loss shall be given within twenty-four hours, but provides no forfeiture for failure to do so, the insured may recover if he gives notice within a reasonable time after he knows of the loss.

If the property insured is personal property it is the duty of the insured to separate the damaged from the undamaged property and make an inventory, stating the quality and cost of each article and the amount claimed thereon. Proofs of loss made and sworn to by the insured and containing a valuation of the property destroyed are not conclusive. The insured may consequently prove and recover upon a higher valuation if he can show that he submitted the proofs in ignorance of his legal rights. Where the insured knowingly and wilfully swears to false proofs of loss the policy is thereby forfeited.

The Company's Liability.

The insurance company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, with proper deductions for depreciation, however caused. Where

a loss occurs under a fire policy the valuation of the property in the policy is not controlling proof of actual value. The value shall in no event exceed what it would then cost the insured to repair or replace the same with material of the same kind and quality.

It is optional with the company to repair, rebuild and replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice within thirty days after receipt of the proofs required, of its intention so to do. The privilege reserved by insurance companies to repair or replace the property destroyed by fire is a reservation for the benefit of the company, which they may adopt or not, as they think proper, but the election once made becomes an absolute agreement and fixes the rights and duties of the parties.

In the event of a disagreement as to the amount of loss suffered, it is usually provided in the policy that the same shall be ascertained by two competent and disinterested appraisers. This is called the appraisal or arbitration clause, and is very important to the companies in many instances to relieve them from extravagant or fraudulent claims. Where appraisers have been appointed to determine the amount of loss, the same does not become payable until sixty days after their report is furnished.

The insurance company is not liable for a greater proportion of any loss on the property insured than the amount insured shall bear to the total amount of insurance covering such property. This provision relates to two or more insurances of the same interest, and not to insurances of different interests, though upon the same property. The object of this provision contained in every policy is to prevent circuity of action. Without it, in any case of double insurance, the insured might bring his action against any one company for the whole amount of loss up to the extent of the policy, leaving the co-insurers to settle their respective objections under the equitable doctrine of contribution; under the provision mentioned the insured can sue one company only for its ratable proportion of the loss.

When different policies contain similar terms, and are concurrent, there is little difficulty in dividing the loss proportionately among them; but when the policies cover in part the same, and in part different property, and contain different and inconsistent provisions applicable to the one loss, it may readily be seen that it is simply impossible to adjust the loss in strict conformity to the requirements of their repugnant conditions. The problem of adjusting such losses often becomes a great difficulty, and is not

always understood by the judges, who, no matter how learned they may be in the law, are often insufficiently familiar with the business of insurance and the science of mathematics to be able to master the situation properly.

Subrogation.

The doctrine of subrogation has such an important bearing upon the subject of fire insurance, that it becomes necessary to understand it clearly.

Subrogation is an equity or right called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies which the creditors may hold as against the principal debtor, by means of which the party paying the debt may be recompensed. To illustrate, a surety who pays a debt which has been reduced to a judgment is entitled to have the judgment kept alive for his benefit and to enjoy, as against the principal debtor, the advantages which could have been claimed by the judgment creditor.

If an insurance company shall claim that the fire was caused by the act or neglect of any person or corporation, the company on payment of the loss shall be subrogated to the extent of such payment, to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to the company by the insured on receiving such payment. This right of subrogation is based upon the equitable principle that the negligent person who caused the loss and who is primarily liable, ought to be made ultimately responsible for the damages sustained. The insured, in the first instance, has his option between two forms of remedy. If he pursues his remedy against the wrongdoer and recovers compensation, the insurance company will escape. But if he chooses first to enforce his claim against the insurance company, the latter is entitled, by way of subrogation, to have recourse over against the guilty party for compensation.

Actions by and Against Insurance Companies.

Where two policies are issued by a company at the same time to the same party and on the same goods, and a loss falls within the terms of each, but greater than the amount of either policy, though less than the aggregate of both policies, the insured may recover a single judgment on both policies for his entire loss.

A clause in a policy of fire insurance limiting the time within

which the insured may bring action thereon is not void as being against public policy, and the fact that the action was not brought within the time specified prevents recovery.

The ordinary fire insurance policy contains a clause to the effect that no suit or action on the policy for the recovery of any claim shall be sustained in any Court of law or equity until after full compliance by the insured with all the requirements of the policy, nor unless commenced within one year next after the fire.

Compliance with a condition limiting the time within which suit must be brought may be waived by the company. Such a condition may be waived by a course of dealing on the part of the company by which it postpones, on various grounds, settlement of the claim beyond the period limited, or by representations and assurances that the insurance will be paid, whereby suit is postponed.

If the insured has failed to bring suit within the specified time after loss, a clear, distinct and unequivocal promise to pay, made after the expiration of the time limited, amounts to a new contract for a valuable consideration and is enforceable.

The usual fire insurance policy contains the following clause: "If with the consent of the company an interest under the policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured, as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended thereto." This is called the "Mortgagee Clause." If the owner of property, after placing a policy of fire insurance thereon, should subsequently mortgage the same, he should have attached to the policy the following: "Attached to and forming a part of Policy No. — of the — Fire Insurance Company.

"Loss or damage, if any, under the policy shall be payable to —, as mortgagee, as interest may appear, and the insurance as to the interest of the mortgagee only therein, shall not be invalidated:

"By any act or neglect of the mortgagor or owner of the within-described property;

"Nor by foreclosure or other proceedings or notice of sale relating to the property;

"Nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy. Provided, that in

case the mortgagor or owner shall neglect to pay any premium due on the policy, the mortgagee shall, on demand, pay the same; and Provided also, that the mortgagee shall notify the company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee, and, unless permitted by the policy, it shall be noted thereon and the mortgagee shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise the policy shall be null and void."

The company reserves the right to cancel the policy at any time, as provided by its terms, but in such case the policy shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation, and shall then cease, and the company shall have the right on like notice to cancel the agreement.

Whenever the company shall pay the mortgagee any sum for loss or damage under the policy, and shall claim that as to the mortgagor or owner, no liability existed, the company shall, to the extent of such payment, be subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee the whole principal due on the mortgage, and shall thereupon receive a full assignment and transfer of the mortgage and of all other securities.

Lost Policies.

It frequently occurs that the insured loses the policy of insurance covering his property. In such case, it is provided by statute in Pennsylvania (act of March 4, 1850), that the company must, upon proof of the loss or destruction of the policy, furnish a copy of the same, together with the transfers which have been approved and recorded on the books of the company. A copy of the original policy so furnished is as effectual for the security and indemnification of the person holding same as the original.

Marine Insurance.

Marine insurance is a contract to indemnify against losses connected with navigation, its principal feature being to insure risks to which a ship, cargo, freight, profits or other insurable interest in property may be exposed during a certain voyage or a fixed period of time. The evidence of a contract of marine insurance is the policy, and such a contract must have all the

essentials of a contract for any other purpose. In every contract of marine insurance there are three implied warranties, relating to seaworthiness, deviation and the legality of the adventure.

Implied Warranties—Seaworthiness.

In every policy of marine insurance there is implied a warranty that the ship is seaworthy at the time the risk commences. Under this warranty it is not necessary that the vessel be seaworthy during the entire voyage, but merely when the risk attaches. By seaworthy we mean that the vessel is in a fit state as to repairs, equipment and crew to encounter the ordinary perils of the voyage which is insured. The cargo of the vessel must be properly stowed and its weight not in excess of the vessel's safe carrying capacity. Neither the ignorance nor the innocence of the insured will relieve him from the consequences of a breach of warranty as to seaworthiness.

Deviation.

The second implied warranty in every contract of marine insurance is that when the voyage contemplated by a policy is described by places of beginning and ending there will be no voluntary deviation from the course fixed by mercantile usage, and no unreasonable delay in the commencement or prosecution of the voyage. A deviation for the purpose of saving persons whose lives are in jeopardy will not be a breach of this warranty, which rule is established on principles of humanity, but a deviation will not be excused if made for the purpose of saving property.

Legality.

The third implied warranty in contracts of marine insurance is that the voyage shall be legal regarding both its nature and mode of conducting it. If the insured engages in smuggling or attempts to violate the revenue laws, or carries passengers when the vessel is not licensed by the Board of Trade to do so, his actions will render his policy void.

Express Warranties.

An express warranty in a policy of marine insurance is an agreement inserted in the policy which alleges the existence of certain facts or promises the performance of certain acts. An

express warranty need not be inserted in the policy, but may be written on a separate paper referred to therein.

An express warranty to sail with convoy can only be complied with when the vessel sails with a legally appointed convoy for the entire voyage insured. If a policy contain an express warranty of neutrality, the vessel or cargo must be the property of a citizen of a neutral country, and, unless the vessel carries the proper documents to prove its neutrality, the express warranty will be broken and the policy become void. If the ownership of a vessel is warranted, and the same be in the name of another than the party mentioned in the policy, a breach of this warranty would result.

The same distinction between a warranty and a misrepresentation applies to contracts of marine insurance in the same manner as we have observed in connection with other contracts. A policy of marine insurance will be avoided in the case of a fraudulent misrepresentation, even if the loss arise from a cause wholly unconnected with such misrepresentation.

The insured must communicate every fact within his knowledge which would induce the insurer to refuse the risk or demand a higher premium.

Insurable Interest as Applied to Marine Insurance.

It is a well-established rule that any person, with the exception of an alien enemy, who is the owner of a vessel or has an insurable interest in the property, may have the same insured.

As in the case of fire insurance, so in marine insurance, a party has an insurable interest if the loss of the property insured would result in pecuniary damage to himself. The Supreme Court of Pennsylvania has held that pecuniary damage may result not only to a person who has an unqualified property in the thing insured, but also to a person who has any reasonable expectation of legitimate profit or advantage to spring therefrom. For example, a person who loans money on a supercargo or on the credit of a vessel has an insurable interest therein. Likewise a person who purchases goods which are delivered to a wharf or railroad station may insure their safe transit.

The owners of a vessel and cargo who are engaged in a joint venture, stand in the relation of partners, each having a lien on the vessel and cargo for his own interest in the co-partnership. A part owner has an insurable interest in the joint venture, to the extent of his advances and disbursements made on account

thereof. An insurable interest may spring from a prior insurance, as occurs when one company which has assumed a risk causes the property to be reinsured in another company.

Any property engaged in or connected with maritime trade may form the proper subject of marine insurance. Such property may include the wharves at which the vessels touch, the warehouses wherein goods are stored, vessels, cargo, freight, the profits of a voyage, advances bottomry, the insurance premium, and the solvency of the insurance company. The word "freight" has a double meaning, sometimes implying the cargo, and sometimes the profits of the ship earned by carrying a cargo. An insurance on the body of a vessel includes whatever is appurtenant to the ship. Legal insurance cannot be placed upon an illegal cargo. A lawful cargo may, however, be insured, although purchased with the proceeds of an illegal voyage. The property insured must be described with sufficient accuracy as to identify it clearly.

The consideration of the contract of marine insurance is the premium which is payable before the risk attaches and may be paid in cash or by promissory note. If the vessel insured fails to sail or the cargo insured is not carried, no risk is incurred and the premium paid must be returned by the insurers. If, however, the risk attaches for a single instance, the premium need not be returned.

The risk in marine insurance is the contingency or event upon the happening of which the insurer's liability attaches. It is very important that the duration of the risk be distinctly set forth. If a ship has been insured and the policy reads from a specified port, the risk commences as soon as the vessel lifts anchor. Some marine policies read "at and from" a certain port, in which event the risk commences at the time the policy is issued, if the vessel at that time was at the port named. The risk on a vessel ends when the same is moored at the port of discharge, in such a manner that its cargo may be unloaded safely.

If a cargo is the subject of insurance, the risk will commence when the cargo is loaded on the vessel and will terminate when the cargo is landed at the port of discharge. If a certain quantity of goods is insured for a specific voyage, part of the cargo cannot be sent on one voyage and the remainder on a second voyage. In such an event, the policy of insurance will only cover the goods sent on the first voyage.

A policy of marine insurance for a specified term, but with a condition annexed that if the vessel be at sea when the term

expires, the risk is to continue until she arrives at her port of destination in the United States, will not cover a loss accruing after the limit of the policy, unless on that date the vessel is on her voyage to her port of destination in the United States.

Different Kinds of Marine Policies.

The amount which is recoverable in the event of loss is determined by the form of the policy. Marine policies are of two kinds (1) open, and (2) valued.

If an open policy, no definite amount is stated as the value of the insurance, but the insurer agrees to compensate the insured for such losses as he can prove he has in reality sustained. In an open policy, the owner of a vessel which has been lost or entirely destroyed, may recover the value of the vessel at the time the insurance was placed. The provisions, outfit and wages paid in advance, together with the premium of insurance, will all be considered in estimating the real value of the vessel. If a cargo is destroyed, the owner may recover the market value thereof at the time the vessel commenced the voyage. The amount recoverable on an open policy of marine insurance is limited to the value of the interest which the insured has in the vessel or cargo when the loss occurs.

In a valued policy, on the other hand, a stipulated sum is named as the value of the property insured, which will be paid upon the happening of the contingency insured against. Upon the total loss of the property insured under a valued policy, the insured may recover the full amount named therein, regardless of the actual value of the interest. An actual total loss occurs when the subject insured wholly perishes or its recovery is rendered hopeless. If a ship is so injured by the perils of the sea as to be incapable of repair, the loss is total, though her materials survive either in fragments or bound together in the original form. Likewise if goods are so badly damaged as to become incapable of use for the purpose intended, there is an actual total loss. When a partial loss occurs, the better rule seems to be that the valuation contained in the policy will be used as a basis to determine the actual loss for which compensation will alone be given. In a valued policy the amount named should represent the real value of the ship or cargo, together with incidental expenses.

Profits and freight are frequently made the subject of valued policies of insurance.

A contract of marine insurance is not complete and effective until the parties have agreed upon the duration of the risk, the perils insured against, the amount to be paid in event of loss, and the rate of the premium.

Perils Covered.

In marine insurance, the insurer is only liable for extraordinary risks. The warranty of seaworthiness, as was heretofore observed, is an assurance that the vessel is competent to encounter all ordinary perils with safety.

By "perils of the sea," which are insured against, is meant those perils incident to navigation from the elements, the ocean, its rocks and shores. The policy only covers the marine casualties which result from the violent action of the elements, and not those resulting from their natural influence upon the vessel or cargo. Running aground in a storm, injuries to animals or cargo by being tossed about or becoming wet, or collision with another vessel in a fog, are all perils of the sea against which a policy of marine insurance is a protection.

If a vessel is unheard of for a long time after its arrival is due the law presumes that the vessel was lost by an extraordinary peril of the sea, in which event the insurer will be liable.

Any loss of property occasioned by fire may be insured against in a marine insurance policy. Fire must result from some extraordinary cause and not the inherent quality of the property taking fire in order to hold the company liable. For example, an insurance company would not be liable on a marine policy if the cargo insured consisted of hemp in a state of effervescence, which generated fire and consumed it. The insurer is liable for goods damaged by throwing water thereon to extinguish fire and for any other loss or injury which is the natural and proximate effect of the fire.

The insurance company is also liable for losses resulting from piracy or theft.

It is no defense to an action on a marine insurance policy that a loss caused directly by a peril of the sea happened through the negligence of the captain or crew. In such case it is sufficient to aver a loss by the perils of the sea, which were insured against, and which directly caused the loss. A leak in a vessel, occasioned by the gnawing of rats, without the neglect of the captain, is a peril of the sea within the meaning of a policy of marine insurance.

Barratry.

Barratry is any illegal act committed by the master or mariner, in his capacity as such, to the prejudice of the owner of the vessel, and has two essential elements. It can only be committed against the owner of the ship, and consequently if the master of the vessel is the sole owner he cannot commit barratry against other parties in interest as shippers of goods.

A captain, however, who is a part owner of a ship, may be guilty of barratry, as against the other part owners. If the captain of a vessel is guilty of a fraudulent act, for his own benefit, and the owner of the vessel is ignorant of the act, and neither authorized it nor consented to it, it is a case of barratry within the indemnity of a policy of marine insurance. Though a policy of marine insurance will protect against loss through mere negligence and carelessness, yet it will not protect against the misconduct of the party insured, and if a loss results therefrom the owner of the property must bear it.

The second necessary element of barratry is that the loss resulting therefrom must happen during the continuance of the voyage and not after the vessel has been safely moored at the port of destination.

Losses not Protected.

A policy of marine insurance does not protect against the usual perils to which every vessel is exposed, but only against such as are extraordinary, as heretofore stated. The insurer is therefore not liable for losses due to ordinary wear and tear or natural decay, nor for losses due to the inherent weakness of the thing lost, as, for example, the loss of rotten rigging or the loss of a cargo caused by spontaneous combustion. Where the cargo consists of perishable goods, the insurer usually limits his liability by stipulating in the policy, by way of memorandum, that it will not be liable on same for the whole loss. The purpose of introducing such a condition into the policy is to guard against liability for losses not arising from maritime perils, but which are due to the perishable nature of the goods.

Most policies of marine insurance contain a proviso that the company shall only be liable in the event of loss for such part of the property destroyed as is not covered by a prior insurance. In this event a subsequent policy will not take effect until the prior policy is exhausted, and if the prior policy is sufficient, the subsequent policy will be suspended. If the insured has taken

out several policies of the same date, each will be responsible for the entire risk, and it is optional with the insured as to which policy he will bring suit on. Under the equitable doctrine of contribution, the company held liable may compel the other companies who were equally liable to contribute their proportionate shares.

General Average.

A general average loss has been defined to be "a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred for the preservation of a ship or cargo." The plainest principles of equity dictate that the sacrifices so submitted to should be made good and the expenses incurred repaid, by a general contribution from all those benefited by either the one or the other, in proportion to the value of the property which those sacrifices and expenses have been instrumental in saving. In other words, if several parties are interested in a particular voyage, and it becomes necessary to throw overboard part of the cargo, the amount of the loss is ascertained directly after the ship's arrival at her port of destination and is there assessed upon each of the co-adventurers, who in law are liable to the party who has suffered by the loss. If it is necessary to sacrifice property to save the ship or cargo, the owner thereof, if insured, is reimbursed his loss by his underwriters. The latter by virtue of the doctrine of subrogation, are entitled to claim against the owners of the interests saved, who, if insured, are in their turn entitled to claim from their underwriters the same proportion of the sum insured in the policy as the amount assessed upon them by way of contribution bears to the whole value of their property saved by the sacrifice. Consequently, when a ship and cargo are insured, general average losses, when their amount is once ascertained, are settled by the underwriters. The means adopted whereby the amount of damages is ascertained, the different parties in interest assessed, and those suffering losses reimbursed, is called the adjustment of general average.

The leading characteristic of a general average loss is that it is the intentional result of the act of man, i. e., it arises from damage purposely submitted to or directly effected by the agency and will of man, and not accidentally caused by the agency of the winds and waves. To entitle the party sustaining such loss to a general average contribution it must appear to have been incurred with a view to the general safety of the ship, cargo and freight.

The general safety must also be the motive for the sacrifice, and if made with any other object in view it can give no claim to a general average contribution. For example, no recovery could be had where the captain of a ship on the point of capture threw money overboard, not to save the ship and cargo, but merely to prevent the money from falling into the enemy's hands.

To constitute a general average loss it is further necessary that it should have been incurred under the pressure of a real and imminent danger. The sacrifices may have been made in good faith for the general safety, but unless that safety shall appear to have been really endangered a claim for contribution cannot be sustained.

Voluntary Stranding.

In the United States the voluntary stranding of a ship when in peril is held to be a general average act, regardless of whether the vessel becomes ultimately a total wreck or not. General average is not, however, allowed in favor of a ship owner if the voluntary stranding was made necessary by the negligent navigation of the ship.

A frequent cause of general average expenses occurs where a vessel in peril puts into a port of refuge for repairs to enable her to continue the voyage. Wages and provisions of the crew are allowed, in general average, from the time of deviating from the voyage for the purpose of putting into a port of refuge until the voyage is resumed, or until the cargo and vessel are separated, or until there is no longer any prospect of continuing the voyage.

The rules of practice for the adjustment of general average losses vary greatly in different countries and in different ports. It has been held that an adjustment made at the end of the voyage, if valid there, is valid anywhere, and the first port reached subsequent to the general average act, where any or all the interests are separated, may be the end of the voyage for this purpose.

Total Losses.

A total loss, in the law of marine insurance, is one on account of which the assured is entitled to recover from the underwriter the whole amount of his subscription. Total losses are either absolute or constructive. An absolute total loss is one which entitles the insured to claim the entire insurance from the underwriter without the necessity of giving notice of abandon-

ment. On the other hand, a constructive total loss is one which entitles the insured to make such claim on condition of giving such notice of abandonment. An absolute total loss results when the subject of the insurance wholly perishes or its recovery is rendered hopeless, whereas a constructive total loss takes place when the subject of insurance is not wholly destroyed, but its destruction is rendered highly probable and its recovery in part doubtful. The difference, therefore, between an absolute and a constructive total loss is that in the former case the loss of the thing insured to the owner thereof is ascertained and permanent, while in the latter case it is inferential and temporary. For example, where a vessel founders in deep water, so as to leave no reasonable hope of recovery, the loss is absolute. If, however, the vessel sinks in shallow water, so as to admit of a reasonable hope of raising and restoring her only at a cost exceeding her value when raised or restored, the loss is constructive. Likewise where a cargo is so damaged by sea perils that the goods cannot be brought to their destination in specie, the loss is absolute; but if, though damaged, it is possible to bring them to their destination in specie only at a cost exceeding their value when so brought the loss is constructive.

Notice of abandonment by the insured to the underwriters is a condition precedent to the right to recover for a constructive total loss. The exception where notice of abandonment is unnecessary occurs where, at the time the insured elects to treat the claim as one of constructive total loss, there is no possibility of the underwriter deriving any advantage from such notice, either because there is nothing to abandon or because the disposal of the property was determined before the opportunity to give notice occurred.

It is necessary to make an abandonment within a reasonable time after information of the loss and after the commencement of the voyage and before the party abandoning has information of its completion. The insured should, on deciding to claim for an absolute loss, give notice of his intention promptly to the underwriters in order that the latter may be given the opportunity to take any steps which they may think proper for the recovery of the property or for the realization of salvage if the property is recoverable. No specific form of notice of abandonment is required, it not even being essential that such notice be in writing, though it is both customary and advisable that written notice be given.

The effect of an acceptance by the underwriters of an aban-

donment is equivalent to a transfer of the insured's interest to the insurer, with all chances of recovery and indemnity.

Where profits are valued and insured by a contract of marine insurance, a loss of the profits is presumed from a loss of the property out of which they were expected to arise, and the valuation of the property fixes their amount.

The method of ascertaining a loss under an open policy of marine insurance is as follows: (1) The value of a ship is its value at the beginning of the risk, including all articles or charges which add to its permanent value or which are necessary to prepare it for the voyage insured. (2) The value of the cargo is its actual cost to the insured when laden on board; or, where the cost cannot be ascertained, its market value at the time and place of lading, adding the charges incurred in purchasing and placing it on board, but without reference to any losses incurred in raising money for its purchase, or to any drawback on its exportation, or to the fluctuations of the market at the port of destination, or to expenses incurred on the way or on arrival. (3) The value of freight is the gross freight, exclusive of primage, without reference to the cost of earning it. And in each case the cost of insurance is to be added to the value then estimated.

Particular Average.

A particular average on goods consists either in a deterioration or total loss of part of the subject insured by the operation of the perils insured against. It is important to distinguish between a particular average and a salvage loss on goods, as some confusion has occurred in the use of these terms.

"A salvage loss is a total loss diminished by salvage, and takes place in relation to goods, where there is either an absolute or a constructive total loss of the subject insured, but some remains of the property have been recovered by the assured. In that case the claim upon the underwriters is for the difference between the insured value and the net proceeds, and the latter are computed by deducting from the gross proceeds of the property saved all charges incurred in realizing the salvage.

Where only a part of the subject insured is sold short of its destination, the remainder being delivered there, the claim, though stated in practice as a salvage loss, is in principle one for particular average.

Conclusion.

The details of the adjustments of marine losses between the insurers and the insured are frequently a matter of great complication and are generally placed in the hands of professional experts called average adjusters. The adjustment reached by such experts is usually by special agreement, made the basis of an amicable settlement among the different interests, and lawsuits are not as common over marine adjustments as in other branches of insurance.

When the partially-damaged ship and cargo arrive, the master or owner advertises for bids for repairs. Bids are accepted, the survey of damage is made and contracts for rebuilding executed. These, with the bills of lading or invoices, the freight manifest, the charter party, the policies of insurance and any other proofs of loss, furnish the adjuster with the necessary material for making up his accounts, apportioning the loss according to the respective rights of the different interests.

As soon as a loss has been adjusted and paid the policy of insurance becomes merged in such adjustment, and thereafter the insurers cannot avail themselves of any defense, which they might have done under the policy as a ground for opening the adjustment. Of course, if there has been any fraud practiced in obtaining the adjustment, redress may be had.

As the subject of marine insurance is a very technical one, it has been thought best, in a book of this character, to treat the same briefly and merely outline its most important features.

COMMON CARRIERS.

*Definition — Classification — Liability — Connecting Carriers —
Stoppage in Transit—Lien for Charges—Interstate Trans-
portation—Railroad Rate Bill—Baggage.*

THE public interest in questions concerning the rights, duties and liabilities of common carriers in their relation to shippers and travelers, and their governmental regulation as public service corporations, renders this subject one of timely and practical importance.

A carrier has been judicially defined as a person or corporation who undertakes to transport or convey goods, property or persons from one place to another, gratuitously or for hire. There are two classes of carriers, private or special, and common or public. The classification of carriers is important because it enters largely into the determination of the legal responsibility of the carrier. The class among carriers to which a particular carrier is to be assigned depends upon the nature of his business, the character in which he holds himself out to the public, the terms of his contract and his relations generally to the parties with whom he deals and the public. The above classification includes carriers by land and by water, as well as carriers of goods, carriers of passengers and carriers of live stock.

The carriage by one of the goods or baggage of another is what is known in law as a bailment, and when it is done without compensation to the carrier belongs to that class of bailments known as mandates. When the carrier is paid for carrying goods or baggage, such carriage of goods is of that class of bailments known as hiring. Private carriers, whether for or without hire, are merely bailees, with the duties and liabilities of such. The foundation of their liability is negligence. The liability of a common carrier is based upon reasons of public policy and not upon the contract of bailment. The common carrier of goods is practically the insurer of the safety of the goods. The liability of a common carrier of passengers for an injury to a passenger generally depends exclusively upon the question of negligence, but the common carrier of goods is held to be an insurer against all accidents not attributable to the acts of God or of the public enemy.

A private carrier is one who agrees to transport persons or property from one place to another in a particular instance only; in other words, one who does not make such services a regular vocation. A common carrier, on the other hand, holds itself out to the public as willing to carry any person or property indiscriminately. A private carrier for hire is one who, without being engaged in such business as a public employment, undertakes to carry and deliver the goods of others upon particular occasions for hire or reward, upon such terms as may be agreed upon. All persons who carry under a special contract, as the driver of a stage-coach, occasionally taking packages to carry for compensation, are private carriers. Likewise one who contracts to cut timber and transport it to the place where it is to be delivered and used does not incur the responsibility of a common carrier, but is only liable as a private carrier for the want of ordinary prudence, care and skill. A common carrier may by special contract limit its common law liability and thus become a private carrier for hire as to the particular goods carried under the contract, although it cannot by special contract create an exemption from liability for actual negligence of itself or its servants.

There are five essential particulars in which a common carrier differs from a private carrier. In the first place a common carrier is liable for all loss or damage of property carried by it except where the loss results from inevitable accident or the act of God, whereas a private carrier is only liable for bad faith or ordinary negligence. In the second place a common carrier cannot stipulate against liability for negligence, whereas a private carrier may. The third distinction resides in the fact that a common carrier has a lien on the goods carried for its charges, *i. e.*, a common carrier may retain possession of the goods until the charges have been paid or sell same if necessary to cover costs of carrying, while a private carrier has no such privilege. Furthermore, a common carrier may be sued for an unreasonable refusal to carry goods offered by the public, but a private carrier may haul such goods for such persons as he prefers without any liability to carry goods offered to him. The fifth difference between a common and a private carrier is the fact that a common carrier is required to receive a compensation for services rendered, whereas it is optional with a private carrier whether or not to receive compensation.

The nature and extent of employment and business in which a common carrier holds forth to the public as engaged, furnish

the limits of the rights, obligations, duties and liabilities of such common carrier. A common carrier may be a carrier of either passengers or freight, or both. A common carrier, being one who transports goods for hire for the public generally, acquires such a special property in the goods delivered as to give it a right of action against any person who deprives it of possession, or who injures the goods. By reason of the public nature of the employment, the responsibility imposed upon a common carrier by law is that of an insurer against loss or injury of the property while in its custody or under its control, or until delivery to the consignee or owner. A common carrier is not liable where the loss or injury resulted from the inherent nature of the goods, nor where the loss or injury was due to the negligence of the shipper, nor where the loss or injury resulted from delay in the transmission of the goods, nor where the loss or injury was caused by the exercise of public authority.

A common carrier is not liable for refusing to carry goods if not possessing facilities for doing so.

Classification of Common Carriers.

An express company which undertakes to carry goods for hire for the public generally is a common carrier. Local express companies which carry baggage to and from the depots of the various railroads are common carriers and perform their duties under the responsibility of such.

Railroad companies which are chartered by the State to carry goods and passengers for hire are the principal class of common carriers. Railroad companies in their capacity of common carriers of passengers incur the responsibility of a common carrier in regard to the baggage of passengers. Street railway companies as common carriers of passengers for hire, having similar rights and liabilities as railroad companies, are required to exercise the highest degree of care, skill and diligence for the safety of their patrons, and are liable for the slightest negligence causing injury or damage to the passengers. A transportation company which does not own or control any means of conveyance itself, but engages in the business of transporting goods through the agency and over the lines of another carrier of its own selection, is a common carrier subject to all responsibilities connected with that character. Such a company cannot by agreement obtain exemption from liability for damages to goods caused by the negligence of its agents or sub-carriers.

Owners of canal boats are common carriers if they hold themselves out as willing to transport merchandise for any one applying to them. The Courts have held that the owner of a tugboat engaged in towing vessels is not a common carrier, and hence not liable as an insurer. Strictly speaking, the owner of a tugboat is not a bailee, for the property towed is not delivered to him nor placed within his exclusive control. The Supreme Court of Pennsylvania has held, however, that the owner of a tugboat incurred the responsibility of an ordinary bailee for hire. A ferryman who transports passengers with their teams, vehicles or other property, but who carry such property, only with the owner or custodian thereof, is not under the obligation of a common carrier. If ferrymen combine with the ferry business the business of carrying merchandise without the presence of the owner, they become common carriers, and hence must exercise extraordinary care in transportation.

The authorities are unsettled as to whether or not hackmen, who transport passengers for hire, are common carriers. Having no special route or scheduled time for making trips, the weight of authority is to the effect that a hackman is not under the obligation of a common carrier.

It is well settled, however, that the proprietor of a line of omnibuses engaged in carrying passengers and baggage between the hotels and depots of a city is a common carrier. Nothing will excuse omnibus proprietors for the loss or injury to baggage except inevitable accident. They would not, however, be liable for the loss of a large sum of money contained in a trunk in excess of an amount ordinarily carried by a traveler.

Palace and sleeping car companies are not liable as common carriers, the company only being bound to exercise reasonable care in looking after the person and property of passengers. Such companies have been held liable for the theft of a pocket-book or jewelry from a passenger, providing they have been negligent in making proper precautions against such theft. It has been held that a sleeping car company is not liable for sickness contracted by an occupant of an upper berth from water dripping from an open ventilating window in the night, where such occupant failed to request an attendant to close it, or where he was in a position to close it himself and did not. The company is liable in damages for breach of contract to reserve a berth for a passenger or to furnish him with a berth in accordance with a ticket paid for by him.

Truckmen, draymen and common porters transporting goods

from one point to another for hire are common carriers. Steamboat companies carrying passengers and freight are common carriers, but ocean steamship companies are not responsible as a common carrier for the baggage of a passenger kept by him in his own stateroom. A canal company, which for the payment of a certain toll allows boatmen to navigate the canal, is not a common carrier, but is bound to see that the canal may be navigated without danger. Warehousemen and wharfingers, who merely receive and store merchandise, or ship same to their destination for hire, are not common carriers, but are only liable for loss arising from the negligence of themselves or agents.

Postmasters and mail carriers are not liable as common carriers for the safety of such property as may be sent through the mails, or for the embezzlement of clerks or deputies employed by them. The postal service, including the money-order system, is a department of the United States Government, in charge of public officers or agents, who enter into no contracts with individuals and receive no hire from them. Such officers are liable to the government for the proper discharge of the duties imposed upon them by law. A postmaster is liable to individuals for money or property stolen or lost from his office through his negligence, or any wrongful act.

Whether or not telegraph companies are common carriers is a question upon which the authorities differ. The transmission of messages is necessarily subject to the risk of mistake and interruption. A telegraph company has not the actual immediate custody of the messages as the common carrier has of the merchandise it carries, and should, therefore, not be under the same obligations as a common carrier. On the other hand, it is argued that there is no difference, in the general nature of the legal obligation of the contract, between carrying a message along a wire and carrying a package along a certain route. In view of the deep interest which the public has in this line of business, and the necessity for the prompt and accurate transmission of messages, the weight of authority has held that a telegraph company is a common carrier. In so holding the Courts have allowed telegraph companies to provide against such risks as arise out of atmospheric influences and kindred causes.

Telephone companies, however, are not common carriers, as they do not transmit messages, but merely furnish subscribers with the means of transmitting their own messages. The law requires telephone, the same as telegraph companies, to furnish equal facilities to all. A telephone company may be compelled

by mandamus to furnish service to any one offering to comply with its regulations.

If a railroad undertakes to transport a train of cars owned by a circus or menagerie company and loaded with wild animals it may make a special contract exempting it from liability as a common carrier. Similarly a railroad company which does not hold itself out as a common carrier of dogs, but allows its baggagemaster to take charge of them for a fee retained by him as a matter of accommodation to the passenger, is not liable for harm done to the dogs. If the baggagemaster delivers the dogs to the wrong person the owner may bring suit against the railroad company.

Elevators in Office Buildings.

There is no distinction, so far as legal liability is concerned, between vertical transportation and horizontal transportation. The owner of an office building operating elevators therein receives no compensation for carrying passengers (other than the indirect compensation in the nature of rental paid by the tenants), and on this account does not come within the definition of a common carrier. The better authority is to the effect that, although the operator of an elevator is not technically a common carrier, nevertheless for reasons of public policy he is held to a similar liability.

Telegraph messenger companies engaging in the business of delivering parcels by its messengers are liable for any loss suffered from the messenger's failure to obey instructions, or the negligence of such messenger, such a company being regarded as a common carrier.

The owners of grain elevators occupy a relation to the public similar to common carriers. They must receive and store grain for lawful prices for any one applying to them. They may be controlled by public legislation for the common good, and a maximum rate of charge may be established by law.

The duty is imposed by law upon every common carrier to receive and carry all goods offered to it for transportation, within the line of its business, upon being paid a reasonable compensation. Damages may be recovered against a railroad company refusing to carry goods through ill-will or disregard of the rights of the shipper.

A common carrier is prohibited by law from discriminating between parties who offer goods for transportation. A common

carrier may, however, charge lower rates for larger contracts, but will be liable in damages for discriminating between individuals on account of personality or on account of the particular class of goods offered for carriage.

A railroad company, as well as other classes of common carriers, owe a duty to the public not to charge exorbitant prices. A breach of this duty will warrant the law's interference, the State having the power to regulate the rates which a common carrier may charge. This right of regulation was exercised by the Legislature of Pennsylvania by the enactment of the two-cent rate bill, which has but recently been declared invalid by the Supreme Court. The right of the Legislature to regulate rates was not questioned, the law being declared invalid on the ground that it was confiscatory as applied to the Pennsylvania Railroad Company.

A common carrier of goods is not under obligation to accept and carry all personal property that may be offered to it, although as a general rule this obligation holds good. Its duty, strictly speaking, is limited to carrying property of such kinds, to and from such places, as it publicly professes and undertakes, or is accustomed to carry and has facilities for carrying. It may make reasonable rules and regulations for the reception, carriage and delivery of freight, including the classification and suitable preparation of articles for shipment. A common carrier may also require prepayment of freight charges from any shipper, although this is seldom done.

Commencement of Liability.

The Supreme Court of Pennsylvania has laid it down as a general rule that the responsibility of a common carrier for goods transmitted to it shall commence when there has been a complete delivery to it for the purpose of immediate transportation. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the common carrier, while they are in his custody, is only liable as a warehouseman. A complete delivery does not merely include a handing over of the goods, but also their acceptance by the common carrier, so as to place the exclusive duty of seeing to their safety upon the common carrier. A railroad company is liable for the loss of goods by fire, which were placed by it on a wharf with notice to a steamboat company to remove them, and the bill of lading provided that the loss should fall upon the carrier alone which had actual custody at the time the loss occurred. Permitting the

shipper to put his cattle in the station yard, no bill of lading being given by the station agent, does not constitute such delivery as to render the company liable for cattle escaping.

A special place for receiving freight may be fixed by custom, and delivery to such place is sufficient to charge the carrier with liability. Actual notice of the deposit of goods for shipment at such places must be given to the common carrier, unless there is an agreement or usage whereby goods deposited at a certain place are to be taken charge of by the carrier without special notice of such deposit. It is not necessary for the carrier to give the shipper a bill of lading to constitute a complete delivery, although this is frequently done.

Termination of Liability.

The extraordinary liability of a common carrier ends when the goods are delivered to the consignee. It is very important to determine just when and under what circumstances the goods are delivered to the consignee.

The carrier's liability cannot end until that of the owner, consignee or warehouseman begins. The liability of the common carrier terminates when its liability as warehouseman begins. As soon as the goods are safely conveyed to the point of destination, and the carrier cannot deliver the goods on account of the death, absence or refusal of the consignee to accept them, the carrier is discharged from further responsibility by storing the goods in its freight depot. If the goods arrive safely at the termination of the journey, and notice is sent to the consignee that the goods are there subject to his order, the liability of the carrier is at an end. Payment of the freight charges by the consignee after notice of arrival of the goods amounts to a delivery, and throws the risk of loss upon the consignee.

Connecting Carriers.

The Courts are very rigorous in the enforcement of the law which requires the common carrier to make delivery of the goods transported to the proper person and will accept no excuse by a common carrier for a wrong delivery except same result from fault of the shipper. A delivery to the consignee's agent or to a third party under instructions from such agent has been held to be a good delivery. It has also been held that delivery of a wife's goods to a husband is good, the presumption being that the husband is the duly authorized agent of the wife. Similarly, delivery

of a money package addressed to the cashier of a bank has been held good if delivered to the receiving teller.

There are four different ways in which delivery to the consignee may be made. First, by personal delivery by the carrier to the consignee, which is required in all cases where the goods are carried in wagons. For example, express companies are under legal obligation to make personal delivery. Second, common carriers by water are only required to notify the consignee of the arrival of the goods and afford the consignee a reasonable opportunity for removal, personal delivery not being required of this class of carriers. Third, railroads are not required to make personal delivery or notify the consignee. However, as their liability as warehousemen begins when the goods have reached their destination, the custom has been adopted of notifying the consignee. Fourth, the liability of a common carrier of baggage does not end until the owner has been given a reasonable opportunity to remove the same, after it has been unloaded and placed in a position by the carrier for delivery.

Let us next consider such excuses as will exempt a common carrier from liability on account of non-delivery of the goods to the consignee.

If in the course of transportation or before final delivery, the common carrier ascertains that some one other than the consignor is the real owner of the goods, and such true owner demands them, the common carrier is discharged from further liability upon delivery of the goods to the real owner. In other words the common carrier may justify failure to deliver to the consignee by proof of demand and delivery to one having a paramount title.

"Stoppage in Transitu."

If a consignor has not received payment for the goods shipped, and ascertains that the consignee has become insolvent, he has a right to reclaim the goods in the custody of the common carrier at any time before they have arrived at their destination. When the consignor has exercised this right and possession of the goods is given him, the common carrier is excused for failure to deliver the goods to the consignee. In such case the goods are not liable for freight due from the consignee. It may be stated as a general rule that where a common carrier receives goods for transportation and delivery to the consignee, the consignor (shipper) parts with the goods and all control over them. De-

livery to the carrier is delivery to the consignee's agent, and the consignor cannot thereafter prevent their delivery to the consignee unless upon such facts as will justify the exercise of the right of stoppage in *transitu*. If the goods have reached their ultimate destination, before the consignor makes claim to the common carrier therefor, title passes absolutely to the consignee and the right of stoppage in *transitu* is lost. To justify the exercise of this right, it must appear that the consignee has become insolvent and that the consignor would in all probability be unable to collect the price of his shipment.

If delivery of the goods by the consignor to the common carrier is qualified or conditional, that is to say, if the shipper notifies the common carrier not to deliver the goods to the consignees until he presents the bill of lading and a draft upon him, delivery to the carrier is not delivery to the consignee, who, unless he complies with the conditions, acquires no title or right to the property. The consignor has the privilege under such circumstances to change the consignee while the goods are in transit, and has also the right to change their destination after the goods have passed into the hands of a connecting carrier by taking a new bill of lading.

The third excuse for the non-delivery of goods to the consignee by the common carrier is proof of their loss or injury by an act of God, by act of the public enemy, by the inherent nature of the goods, by act of the shipper or his agent, and by public authority. Certain of these conditions will be discussed later on.

Bills of Lading.

By the act of September 24, 1866, it is provided in Pennsylvania that bills of lading are negotiable instruments. A bill of lading is a receipt for the goods carried, given by the common carrier, and when properly indorsed and delivered operates as a transfer and delivery of the property itself, and the consignor loses the control of the goods by such transfer. A common carrier is not liable for delivery otherwise than in accordance with the bill of lading, or to any one not authorized to receive the goods, even though he be the consignee.

Any bill of lading which shall have the words "not negotiable" plainly written or stamped on the face thereof shall not be negotiable.

If goods are delivered to a common carrier it will not operate as a delivery to the consignee, where by taking the bill of lading

to his own order the shipper reserves to himself the power of disposing of the property. It has been held that if a bill of lading is fraudulently issued, a bank cashing a draft with the bill of lading attached acquires a good title to the property in question. A bill of lading, although negotiable in the sense that it may be transferred by indorsement and delivery, is not negotiable in the sense that a bill of exchange or promissory note is negotiable. In the case of a bill of lading the transferee only takes such rights as the transferor had, whereas an innocent purchaser for value of an ordinary negotiable instrument acquires an absolute and indefeasible title thereto.

If the common carrier has delivered the goods to a wrong party, it is no excuse that the indorsee of the bill of lading was unknown to the carrier, and notice of the arrival of the goods could not be given.

It is the duty of the common carrier to demand production of the bill of lading by the consignee before delivering possession of the goods, for the carrier will be liable to the holder of the bill of lading if it delivers the goods to the consignee after he has assigned the bill of lading.

The transfer of a bill of lading before the right of stoppage *in transitu* is exercised will defeat the right, the assignment of the bill of lading transferring the title to the property. This rule is based upon the well-established doctrine of law that whenever one of two innocent parties must suffer by the act of a third, he who has enabled the third person to do or occasion the injury must suffer the loss.

If the goods carried are consigned by the shipper to the purchaser upon payment of a draft attached to the bill of lading for the purchase price of the goods, no title to the goods will pass to the purchaser, and the purchaser will not be entitled to a delivery of the property until the draft accompanying the bill of lading has been accepted and paid.

If bills of lading have been issued in sets, providing that when delivery has been made on one the others are to be void, a delivery by a common carrier upon presentation of a duplicate bill properly indorsed discharges the common carrier from any further liability.

Originally bills of lading were transferable by delivery only, but to-day, unless a bill of lading directs delivery of the goods to the holder, the common carrier would be responsible if it delivered the goods to any one but the original holder of the bill of lading, unless the same was properly indorsed. Delivery of

goods to a third person by a common carrier on an unindorsed bill of lading is always at the risk of the carrier.

Delivery "C. O. D."

When a common carrier accepts goods marked "C. O. D." it undertakes not to deliver them unless the condition of payment is complied with. When a bill of lading requires the carrier to collect charges upon the goods on delivery, if the carrier delivers the goods without collecting the sum due, the carrier becomes liable for the debt. If the common carrier accepts the consignee's check, payable to the order of the consignor, for the amount to be collected, which is accepted by the consignor, the common carrier is relieved from all further responsibility, even though the drawer had no funds in bank when the check was drawn. If a common carrier has delivered a package marked "C. O. D." to the consignee, and received payment, and the transaction was fraudulent and the package worthless, the consignee may reclaim his money at any time before the common carrier has paid the money to the consignor guilty of the fraud. A consignee has the right to inspect a package or any goods prior to paying collection charges.

It sometimes happens that goods in the possession of a common carrier become mixed or confused. The consignee is entitled to the delivery of the identical goods shipped to him, and if the confusion of goods arises through mistake the common carrier is liable for damage.

Common Carrier's Liability for Damages.

We have heretofore mentioned the fact that common carriers are liable for loss or damage to goods or property carried by them in two capacities—(1) as insurers, and (2) as bailees for hire. To exempt itself for loss of goods received for transportation the common carrier must show that the loss resulted from what is known as an "act of God," such as an unusual snowstorm or an extraordinary flood. A loss or injury is not attributable to an act of God where it is caused by a landslide caused by a rain of not extraordinary violence or the falling of a sign in an ordinary windstorm. Damage caused by an earthquake is a good illustration of the exception which will relieve a common carrier from liability. It has been held that to render a common carrier liable for damages for the destruction of goods by freezing while in transit, under a bill of lading exempting it from damages

for freezing, it must not only be guilty of unreasonably delaying transportation, but the goods must have been frozen during the delay. It will be observed, therefore, that an act of God causing injury must be such an act as could not be foreseen or guarded against by human foresight or prudence. Such an act of God, in order to exempt a common carrier from responsibility, must be the immediate and proximate cause of the loss.

Loss or injury caused by the act of a public enemy will not render a common carrier liable. Thieves, rioters or irresistible mobs have been held not to be public enemies, but a pirate is regarded as such.

A common carrier is not liable for non-delivery of goods taken out of its possession under a valid legal process, but the common carrier must promptly give notice to the owner of such legal seizure.

A creditor of the shipper may attach property in the depot or yard of the common carrier or goods in actual transit at the time of garnishment. A common carrier cannot be held as garnishee for property which is beyond the territorial limits of the jurisdiction of the Court issuing the process. A common carrier would be liable, however, for the value of fish shipped over its line which were seized by a game warden on the ground that the fish were illegally caught, where such a warden had neither legal nor apparent legal right to seize the same. To excuse the common carrier it must show that the property was seized under valid legal process.

The law imposes a duty on every common carrier of goods to adopt all reasonable means of lessening the damage to goods which have become injured while in transit. Thus, if packages of fur become wet, the common carrier must open them and let them dry. Where, however, an express company is not advised that a package given it for transportation contained gold it is not liable for not searching the ruins of a fire to recover the property.

A common carrier is not liable for losses resulting from the inherent nature of the goods. "Inherent nature of goods" has been held to mean that the loss occurs as a result of a vice, defect or infirmity in the goods, as, for example, where fruit decays or liquids evaporate. A common carrier has been held not to be liable for loss due to the bursting of a hogshead of molasses by reason of fermentation, which results from the operation of natural laws against which a common carrier does not insure.

Liability as Bailee.

We have heretofore discussed the common carrier's liability as an insurer. We will next inquire under what circumstances a common carrier is liable as a bailee.

If goods are delivered to a common carrier with instructions to await further orders from the shipper before transporting same, the common carrier is only responsible as a warehouseman, while the goods are thus in its custody. As such, the common carrier is not an insurer of the safety of the goods, but is only liable in case of gross negligence. In other words, as a warehouseman, a common carrier is only bound to exercise the ordinary care and prudence which is required of a bailee of any property for hire.

Where goods have been transported to their proper destination, and the consignee notified of their arrival, the liability of a common carrier as an insurer ceases and its liability as a bailee of the goods commences. In such cases the carrier is responsible for the manner in which it keeps the goods, but it is not responsible absolutely for their safe delivery.

Where goods pass over several connecting lines the rule that the liability of the common carrier ends when it has deposited the goods in a warehouse at the connecting point does not apply. The liability of each carrier in such case continues as an insurer until it parts with the possession and control of the goods by delivering them to the succeeding carrier. If the connecting carrier refuses to receive the goods within a reasonable time the carrier must immediately notify the consignee.

When the goods have arrived at their destination it is the duty of the common carrier, as bailee thereof (warehouseman), to store them safely, and it is responsible for the ordinary care and attention of its servants and agents in caring for them, so that they may be delivered whenever called for. The stipulation in the bill of lading that property not removed by the party entitled to receive it within twenty-four hours after its arrival at destination shall be at the sole risk of the owner, does not relieve the company from liability for the loss of the goods, owing to its failure to exercise the care required of a warehouseman.

A common carrier would be liable as a bailee for failure to provide suitable places for feeding and watering live animals carried by it. Unless by special contract a common carrier agrees to transport and deliver goods within a prescribed time, it is not liable for delay in delivering the goods, unless such delay be beyond a reasonable time. Low water in a canal, or the freezing

of a river might have caused delay, for which the carrier would not be responsible.

Contracts Limiting Liability.

It may be laid down as a settled rule of law that a common carrier may by contract limit its liability in the event of loss, to that of an ordinary bailee for hire, but a common carrier cannot by contract release itself from liability for negligence. These contracts limiting liability usually provide that the common carrier shall not be responsible, beyond a certain sum named, unless the value of the goods be declared beforehand; or that the common carrier shall not be liable at all unless a claim is presented within a certain time, or in a certain manner. As such contracts affect the interest of the public in general, let us consider how they are construed by the Courts.

It can readily be seen that the public would be at the mercy of common carriers, if they could by special contract free themselves from their common law liability. Hence the Courts forbid common carriers from making a particular class of contracts. It is well known that express companies make contracts limiting their liability to fifty dollars for goods which are shipped by them, unless the value of such goods has been stated when they are left for shipment. The law will sanction such a contract.

A common carrier may, by special contract, release itself from liability for losses caused by inevitable accidents, such as fire, or perils of navigation. In a case recently decided, a bill of lading provided that goods should be delivered to successive carriers, and that no carrier should be liable for loss or damage after said goods were ready for delivery to the next carrier, and a railroad company transported the goods to a seaport and deposited them in its warehouse ready for shipment when the boats of the connecting carrier should arrive; the Court held that the railroad company was not liable for the loss of the goods by fire while awaiting transportation, the fire not being caused by the negligence of the railroad company.

By Public Notices.

A common carrier may, by publicly posting a general notice, require all shippers to state the nature and value of the property to be shipped, and the carrier will be absolved from the consequences of a loss beyond the apparent value of such property. A common carrier may also limit its liability by public notice of

a reasonable rule or regulation as to the manner of entry or consignment of the goods, the statement of their value and character, and the carrier's charges. If a common carrier relies on a mere notice or advertisement as a limitation of its liability, the language of the publication must be plain, explicit and unambiguous. The shipper of goods, if given reasonable opportunity, must inform himself of all rules and regulations designed to insure good faith and fair dealing, and hence a general notice publicly posted will discharge a common carrier, even though the shipper had no knowledge of such regulation. New York is the only State, to the writer's knowledge, where this rule of law does not exist.

The consignor, upon delivering goods to a common carrier for transportation, receives a bill of lading which contains the terms and conditions upon which the merchandise is to be carried. The consignor is presumed to assent to the bill of lading when he accepts it.

Contracts which are to be partly performed in the State where they are made and entered into, are governed by the laws of such State, although they are to be performed partly in another State. When, however, a contract is made in one country or State to be wholly performed in another, its validity is to be determined by the law of the place of performance. This rule was applied in a suit brought in Pennsylvania by a passenger against a New Jersey railroad corporation for the loss of his trunk, and it was held that it made no difference that the undertaking was in part to carry the baggage across the Delaware River, as the inhabitants of both States have equal rights of navigation and passage on that stream.

A consignor of goods has power to contract for their carriage and bind the consignee, but the consignor is not bound by a special contract limiting liability made by the consignee with the carrier, unless it is shown that he had notice of the consignee's contract for carriage. A contract, fairly entered into, limiting a right of recovery to a sum expressly agreed upon by the parties, as representing the true value of the property shipped, is not a contract exempting the carrier in any degree from the consequences of its own negligence, but simply fixes the rate of freight and liquidates the damages. A shipping receipt that goods are shipped "at owner's risk" exempts a common carrier (even connecting lines of road) from liability, save for the negligence of the party charged therewith.

The Pennsylvania cases have decided that if the valuation

of goods shipped is an agreed one, made in consideration of reduced charges, it will bind the shipper. But otherwise any stipulation fixing the limit of the carrier's liability in case of loss or injury is void, if the loss is the result of the carrier's negligence.

The general freight agent of a common carrier is authorized by the carrier and clothed with all the power to make contracts for freight, or in respect to the carrying and delivery of freight, that the carrier itself has and to have power, therefore, to make valid contracts for the delivery of property at places on other roads beyond the terminus of the carrier's own route. A station agent or baggagemaster has only the authority to make contracts for the carriage of goods to the end of the company's road, but not to points beyond. A local station agent has no power to make a special agreement extending the liability of his company for shipments beyond his own line. It has been held that a shipper contracting with a railroad station agent for the transportation of freight is under no legal obligation to make inquiries concerning the station agent's instructions or powers. Station agents are presumed to have power to make contracts for their railroads for the transportation of freight, and the public cannot take notice of any restrictions upon their powers unless notified thereof in some way.

Carrier's Lien for Charges.

The law gives a common carrier a lien upon the goods carried by it and still in its possession as security for all compensation and charges due for their carriage, as well as all proper storage expenses. By such a lien we mean that the common carrier has the right to retain possession of the goods carried until all charges are paid. To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between the owner of the goods and the common carrier. A carrier who receives goods from another carrier and who is given notice that the freight charges have been paid in advance for through shipment by the shipper, cannot acquire any lien on the goods for its proportionate share of the freight charges.

The lien given to a common carrier for freight charges has priority over the claims of general creditors of the shipper. The carrier's lien is lost as soon as it parts with the possession of the goods, but while the common carrier has control of the goods they cannot be taken by the shipper, consignee or sheriff without

furnishing indemnity for the carrier's charges for transportation or storage. Unless regulated by statute a common carrier has no right to sell the goods upon which it has a lien for charges, except by judicial order or legal process. If the goods are so sold the common carrier must account to the owner for the proceeds over and above the carrier's charge due under the lien.

Interstate Transportation.

In view of the government's attitude with reference to the proper supervision of corporations, it is of vital importance at the present time to understand clearly the legal principles which control legislation affecting corporations engaged in interstate commerce, and particularly such principles as apply to common carriers.

The Constitution of the United States vests in Congress the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." It was early decided by the Federal Supreme Court that interstate commerce, or commerce among the several States of the Union, consisted of intercourse and traffic, including navigation and the transportation of passengers and property, the same as selling, purchasing and exchange of commodities between the citizens of different States.

In 1887 Congress passed the Interstate Commerce Act, and assumed control of the interstate railway traffic of the country, the objects of this statute being "to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar conditions and circumstances; to prevent undue and unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line, and to abolish combinations for the pooling of freights."

The Interstate Commerce Commission was established to administer and enforce this act. This Commission is authorized to inquire into the management of the business of all common carriers doing an interstate business, and to demand from such carriers such information as is required by the Commission to properly perform its duties. The power is reserved to each State to regulate the charges of transportation wholly within the State. Congress may, however, prohibit railway companies from charging more than reasonable compensation for the services rendered by them in interstate transportation. The Interstate Commerce

Act does not apply to transfer and switching companies, express companies, bridge or ferry companies, or stock yard companies, not operating railway lines.

The first section of the Interstate Commerce Act provides that all rates established by a common carrier must be just and reasonable, and in determining whether or not a certain rate is reasonable the Commission will consider the interest of the common carrier, the shipper and the general public. The object which it is the policy of the law to effect is equality of rates. A reduction in rates does not imply that former rates were unreasonable, because such reduction may be due to an increased volume of business and a decrease in the cost of transportation.

A common carrier is prohibited by the second section of the Interstate Commerce Act from charging one shipper a greater or less compensation for any service rendered in the transportation of passengers or property than it charges another. Under this clause only unjust and unreasonable discriminations are illegal, and where a consideration exists for reduced rates, the charging of such rate will not constitute an unlawful discrimination. To render a rate illegal, some preference must be shown.

The third section of the Interstate Commerce Act forbids a common carrier making or giving any undue or unreasonable preference or advantage to any persons, firm or locality, the purpose of this section being to avoid unjust discriminations for or against any party or place, it being required that rates be substantially equal and reasonable. It can readily be seen that it is unsound in principle for a railroad to make artificial differences in market conditions by an arbitrary differential in rates so that the products of one section of the country must go to one market, and the products of a different section to another. It is hard to define what is an undue preference or advantage within the meaning of the law, but it is held to consist in giving a privilege to one party or place which is denied another under the same condition. It is the duty of the Interstate Commerce Commission to ascertain the circumstances and decide accordingly. A through rate is not an unjust discrimination against an intermediate point, or against local shippers, because it is less proportionally than the rate from such point to the common destination.

A common carrier is also compelled by section three of the act to extend reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and to receive, forward and deliver passengers and freight to and from their several lines and those connecting therewith, and are prohibited

from discriminating in their rates between such connecting lines. Charges for long and short hauls are regulated by the fourth section of the Interstate Commerce Act, this section making it unlawful for a common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or freight for a shorter than for a longer distance under similar circumstances. The object of the law is to encourage normal competition, and a schedule of rates which would stifle such competition is therefore unlawful. The law consequently imposes the duty upon a common carrier to print and keep for public inspection schedules showing the rates, fares and charges for transporting passengers and freight. It is unlawful for a common carrier to collect or demand a greater or less compensation than that which is set forth in the published schedules of charges. Any effort on the part of the shipper to secure lower rates is constituted a misdemeanor. The law further provides that a common carrier shall not raise its charges or rates as published, except after ten days' public notice.

"Pooling Freights."

Any contract, agreement or combination entered into by one common carrier with any other common carrier is unlawful under section five of the act, if such contract provides for the pooling of freights of different or competing railroads, or for dividing between them the aggregate or net proceeds of the earnings of such railroads. A money pool under which the net earnings of competing roads are divided, or a distribution of property among competing railroads, effected on percentages previously agreed upon, is prohibited by the act. This provision of the law does not apply, however, to a pooling contract between a railroad company and a pipe line company organized for the purpose of transporting oil.

The seventh section of the act under consideration is of particular interest to every shipper of goods. It forbids a common carrier from entering into any contract to prevent by change of time schedule, carriage in different cars or by any other means, the transportation of freights from being continuous from the place of shipment to their destination.

Space will not permit an analysis of every section of this act, the more important ones only being mentioned. Anyone aggrieved by a violation of this act may seek redress by proceedings before the Interstate Commerce Commission or may

elect to sue in the Courts of the United States, the Elkins Act of 1903 giving jurisdiction to the Federal Courts in the matter of any violation of the Interstate Commerce Act.

"The Railroad Rate Bill."

Experiment established the fact that many deficiencies existed in the Interstate Commerce Act of 1887, and as a result the broader act of 1906 was passed by Congress, popularly termed the "Railroad Rate Bill." The object of this law is to give broader relief for every discrimination, injustice and extortion practiced by a common carrier engaged in interstate commerce.

This act, by the first section, is made applicable to any person or corporation engaged in the transportation of oil or other commodity (except water and natural or artificial gas) by pipe lines or partly by railroads. The term common carrier is made to include express companies and sleeping car companies, and the term "railroad" within the meaning of the act shall include all bridges and ferries used or operated in connection with any railroad. This act forbids any common carrier (on and after January 1, 1907) to issue or give any interstate ticket, free pass or free transportation for passengers except to its employees and their families, its officers, agents, surgeons, physicians and attorneys-at-law; to ministers of religion, traveling secretaries of railroad Y. M. C. A.'s, inmates of hospitals and charitable institutions and persons engaged in such work; to inmates of soldiers' and sailors' homes, to necessary caretakers of live stock, poultry and fruit; to employees on sleeping cars, and to linemen on telegraph and telephone companies; to postoffice inspectors, customs inspectors and immigration inspectors; to newsboys on trains, to baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians attending such persons.

An important provision of the Railroad Rate bill which will have far-reaching effect is that prohibiting any railroad company, on and after May 1, 1908, from transporting across any State or Territorial line or to any foreign country any article or commodity (except timber and the manufactured products thereof) mined or produced by it, or under its authority, or which it may own, except such articles or commodities as are necessary for use in the conduct of its business as a common carrier.

Common carriers are required by the act to construct and

operate upon reasonable terms side tracks and switch lines upon application of any shipper tendering interstate traffic for transportation. The common carrier must also furnish cars for the movement of such traffic without discrimination in favor of or against any shipper. The Interstate Commerce Commission is given full power to enforce these provisions of the law.

The Railroad Rate bill amends the Interstate Commerce Act with reference to the publication of rates, the Rate bill providing that common carriers must print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between all different points on its own route and between points on its own route and points on the route of any other carrier by railroad, pipe line or by water, when a through and joint rate has been established. The schedules so printed by a common carrier must plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, also stating separately all terminal charges, storage charges, icing charges and all privileges or facilities granted or allowed, and any rules or regulations which in any wise change any part of the aggregate of such rates and charges, or the value of the services rendered to the passenger, shipper or consignee. The schedules are required by law to be printed in large type, and copies for the use of the public must be kept posted in two public places in every depot, station or office of the common carrier, where passengers or freight are received for transportation.

Another important change of benefit to the shipping and traveling public, effected by the Railroad Rate bill, is the requirement that no change shall be made in the rates, fares and charges which have been filed and published by a common carrier, except after thirty days' notice to the Interstate Commerce Commission and to the public, published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges will go into effect.

A common carrier is forbidden by the act to engage in the transportation of passengers or property unless the rates have been filed and published as provided by law. It is unlawful for any common carrier to charge a greater or less compensation for such transportation of passengers or property than those published, and the act further makes it unlawful for any common carrier to refund by any device any part of the rates, fares and charges as published, or to extend to any shipper or person any

privilege of facilities except such as are set forth in the traffic schedule advertised.

The Interstate Commerce Commission is given the power under the act to establish rates or declare what shall be a proper charge in certain cases after an investigation of the circumstances.

The Interstate Commerce Commission is authorized to require annual reports from all common carriers and from the owners of all railroads engaged in interstate commerce. Such reports must be filed before the 13th day of June in each year, and must set forth the most comprehensive statistics regarding the business of the common carrier. The Commission is given power to prescribe the form of all accounts kept by a common carrier, and shall at all times have access to all accounts, records or memoranda kept by the common carrier.

Failure to publish tariff schedules and granting or accepting rebates or kindred discriminations is punishable by a fine of not less than \$1,000 and not more than \$20,000. The maximum fine was imposed by Judge Landis in the well-known case against the Standard Oil Company.

Carriers of Passengers.

The subject of common carriers cannot be properly concluded without a brief discussion of the right and liabilities attaching to a common carrier of passengers, which we have only referred to heretofore in a very general way.

There is a very marked distinction between the liability between a common carrier of freight and one of passengers. A passenger has judgment and discretion and the power of locomotion, and consequently the law which holds a common carrier of freight liable as an insurer, except in cases of inevitable accident, does not apply to a carrier of passengers. A carrier of passengers is responsible for any injury to a passenger caused by its negligence or that of its servants or employees. A common carrier of passengers is bound to exercise the highest degree of care and prudence in safeguarding persons carried by it, but in regard to the baggage of a passenger it is liable as an insurer. The relation of carrier and passenger is created by contract, express or implied, and where no express contract is made, the liability of the carrier depends upon the duty imposed by law, in the event of the passenger sustaining personal injuries.

A passenger is one who enters the vehicle of a carrier with the intention of paying the usual fare for his transportation, or

who is supplied with a ticket or pass, which gives him the right to ride to a given point. If a railroad company accepts passengers on a freight train, charging the regular fare, it incurs the same liability for their safety as if they were in the passenger cars. As soon as a passenger has made a contract for his passage upon a vehicle of a common carrier, and presents himself at the proper place to be transported, his right to care and protection of a passenger commences. Walking into a station, ticket office or waiting room, with intention of becoming a passenger places one in the position of a passenger. This regulation is established when a street car stops at a usual place for passengers and persons get on the steps, or the platform of a car to take passage. If a person by mistake gets on a passenger train which does not stop at the station named in the ticket and the conductor punches it so that he cannot ride on another train, such person is entitled to all the rights of a passenger upon the train upon which he is riding. It is not necessary for a person to have entered upon the vehicle of the common carrier to constitute him a passenger, as he may become such before he enters the train or car, and before transportation begins. The fact that a person has not paid his fare at the time an accident occurs in which he is injured would not make him any the less a passenger if the conductor had not demanded his fare.

The relation of carrier and passenger ends when the passenger has been safely discharged at the point of destination called for by his ticket. Where a passenger is sleeping in a day coach when the train arrives at his destination, his failure to leave the train immediately does not terminate the relation of passenger or carrier, or alter the latter's duty to him as such. Traveling on Sunday for pleasure in violation of a statute would not alter the relation of the carrier and the passenger so as to relieve the carrier from liability for negligence.

A ticket providing for a single passage or "one continuous passage" between two points prevents the passenger from stopping at any intermediate station and renewing the journey on another train, and upon leaving a train at any intermediate point the passenger terminates his contract as such. It has been held in Pennsylvania that the fact that a conductor on one part of the route allowed a passenger to stop over on a through ticket, did not entitle him to the same privilege from a different conductor on another part of the road.

A trespasser, "dead head," or tramp entering a train to steal a ride is not a passenger, even though an engineer gives

authority to do so. A man having an understanding with a conductor, whereby he may ride free, commits a fraud on the company and is only a trespasser. The only duty which a common carrier owes to such people is to abstain from wilful or reckless injury. A person who gets on a train after it has started or who tries to board a moving street car, is not a passenger until he has reached a place of safety inside the conveyance.

A common carrier has the right to provide on its ticket that same must be used on date of issue or with a limited time thereafter. A round-trip ticket punctured for separation into two parts, and marked "not good for passage if detached," is good where the parts have become separated by accident, if both parts are presented to the conductor on the outward trip. The wrong part of a round-trip ticket returned by mistake to a passenger by the conductor, is good on the return trip.

A person entering a car at a depot to assist an aged or infirm person to a seat is not a passenger, and a common carrier only owes to such person the duty of providing safe accommodations with regard to its depot and platforms.

If the car starts before such a person has an opportunity to leave, the party assisting a passenger on board must remain until a conductor stops the car, and any attempt to alight while the car is in motion will be at the risk of the party attempting to do so. A common carrier is under no legal obligations to hold a car until every person not a passenger leaves.

An employee of a common carrier riding to or from his home and place of business free of charge is not a passenger, and the carrier is not liable for his death or injury caused by the negligence of a co-employee. The enactment of an Employers' Liability act, recently recommended to Congress by the President, will doubtless change the law in this regard.

A common carrier has the right to make reasonable rules and regulations to prevent passengers from occupying positions on its cars which are dangerous, but when passengers are permitted and in certain instances required to occupy dangerous positions, the carrier must still exercise extraordinary care and diligence for their safety. As has been previously pointed out, a common carrier of passengers is not an insurer of their safety, but is required to use the highest degree of care to guard against accident. The degree of care required, of course, depends largely upon circumstances; and if an accident occurs from a defect in the roadbed, machinery, construction of cars or defective appliances of any kind, the carrier is responsible, being required to

exercise sufficient care and prudence to prevent the occurrence of such accidents.

Common carriers are not bound to place bars or screens on their windows to prevent passengers putting their arms out. Carriers of passengers in conveyances operated by steam and electricity, where the consequences of accidents due to defects in machinery or appliances are usually fatal, must use every precaution which human foresight can provide to secure safety in adopting new improvements and in the general operation of their road. Thus a common carrier has been held liable for injuries to a passenger caused by an electric shock from a hand rail charged with electricity because of imperfect insulation, which could have been readily discovered. The rule has been established, however, that a common carrier is not liable for defects which could not be discovered by the application of any tests known or practiced, or by the usual and proper tests by skillful and experienced men.

In cases where a common carrier uses the track of another road or the bridge of another company, which it neither owns nor controls, but merely leases or obtains the right of trackage thereon, it makes the track or bridge so leased its own so far as its liability for accidents is concerned, which result from defects. A common carrier must construct its road in such a way as to resist such violence of the weather as might be expected to occur in the climate and locality through which it runs. No one can be subjected to liability for an act done without fault on his part, and hence a carrier is not liable for an injury to a passenger caused by the breaking of a rail from the extreme cold under circumstances which human foresight could not have anticipated or prevented.

Where the conveyance is by stage coach the proprietor is required to furnish safe coaches, well-broken horses, good harness and careful drivers. Common carriers by steamboat or steamship must provide navigable vessels and even a certificate by a United States inspector that the vessel, her boilers and machinery come up to the requirements of the statute, would not exempt the owner from liability if the vessel was defective. Carriers by water must provide guard-rails and safe approaches and landings for the receipt and discharge of passengers, being liable for any injury resulting to a passenger from falling off a stage, plank or gangway.

The law requires carriers of passengers by sea to employ a qualified physician. A railroad company which assumes volun-

tarily to employ a surgeon to be given charge of injured persons is not liable for the negligence of the surgeon, provided he is a properly qualified medical practitioner and is furnished with proper instruments and medicine.

Discriminations Against Passengers.

All common carriers of passengers are required to receive and transport all persons who request a passage and offer to pay the fare, provided of course there is room in the car and the person applying for passage is not intoxicated or in an otherwise unfit condition. On this ground refusal of a street railway company to accept a passenger carrying in his arms a live goat was sustained by the Supreme Court. A common carrier is not obliged to carry a person who is fleeing from justice or one of known dangerous habits. Slight intoxication, such as would not render his conduct obnoxious to the other passengers, would not be sufficient ground to refuse a man passage on a public conveyance. A common carrier may require a blind man to secure an attendant before accepting him as a passenger, as a blind man is incompetent to travel alone, particularly on a railroad or steamboat. A common carrier may exclude from its cars any passengers who enter for the purpose of selling books, papers or refreshments, as this right is regulated by special license or agreement with the carrier. Unless regulated by a statute (as in certain of the Southern States) a common carrier cannot refuse passage to a person on account of race or color. Equal accommodations must be provided for all, although a certain class of passengers may be required to occupy a certain part or section of the car.

A common carrier is compelled by law to protect its passengers from violence, insult or ill treatment from either its servants or fellow-passengers and strangers. Any passenger injured by the wilful and malicious conduct of a servant or employee of the common carrier is entitled to damages. It has been held that where a conductor of a street car had given directions to transfer to another line, and stopped the car, but not for the purpose of enabling the passengers desiring to transfer to alight, it was the duty of the conductor to warn the passengers to keep their seats till he should give further directions. The fact that the motorman left the car on which a passenger was riding, and that the conductor took his place and became acting motorman in sole charge of the car, was not such negligence as would

render the street car company liable for injuries received by a passenger in alighting from the car. It is well settled that a common carrier is liable for an assault by its conductor upon a boy who attempts to steal a ride on the carrier's car. If a passenger provokes or commences an altercation with an employee of a common carrier, and this brings an assault, it has been held that the carrier would not be liable. Mere abusive language is not sufficient to justify the commission of an assault by a conductor on a passenger. Sneers or contemptuous gestures will not justify an assault, but a conductor or other employee of a common carrier may exercise the right of self-defense if the passenger commences the assault. A passenger cannot recover for abusive language addressed to him by the conductor, or for the act of the latter in knocking him down after he had left the car, where the offensive language was used and the blow struck in response to abuse by the passenger who was the aggressor in the conflict. If a conductor beats a passenger who slaps his face with his hand, and in so doing uses force greatly exceeding that which appears to a reasonable man necessary to repel the assault, the carrier is liable.

If an agent or employee of a common carrier causes a passenger to be arrested without legal cause, the common carrier will be liable for false imprisonment. For example, if a passenger has been arrested upon a false charge of not having paid his fare, the common carrier will be liable. Should a conductor cause the arrest of a passenger on the ground that he had proffered counterfeit coin in payment of his fare, and it should subsequently be proved that the coin was good, the carrier would not be liable for false arrest. This conclusion seems to contradict the previous statement, but the rule is based on the principle that the conductor in causing the arrest of the alleged counterfeiter was not acting within the line of his duty as agent of the common carrier, but was performing a supposed service to the community by procuring the arrest of a person presumed to be a criminal.

A street railway company is not guilty of negligence in operating its cars during a strike of its employees, and if a passenger was struck and injured by a missile thrown by one of a mob of striking employees of the street car company, he would not be entitled to recover damages from the common carrier. The duty of the common carrier is to protect its passengers from harm, and any assault or violence from a fellow-passenger, and would be hence liable if one of its employees permitted a drunken

and disorderly person to enter the car after being once ejected, even if the employee had no reason to believe that the ejected passenger would again become disorderly or assault any of the passengers. A common carrier would not, however, be liable to a passenger for injuries received by being thrown down or jostled by a drunken passenger who is being ejected from the car by the conductor who is using due care. It has been held, on the other hand, that a quarrel by a guard on an elevated railroad train with an intoxicated passenger, upon a crowded platform, by which a crowd is caused to jostle a passenger on the platform so as to lead him to seize the railing, whereby his arm is caught between the railings and two cars and injured, is such negligence as would render the common carrier liable in damages to the injured party.

Not only does a common carrier owe a duty to well passengers, but also to those who are sick. A common carrier has the right to exclude one whose sickness would be detrimental to the safety, health or comfort of the other passengers, but such right must not be exercised inhumanely. For illustration, a common carrier has the right to reject a passenger who breaks out with any eruption which, according to the best medical advice at hand, is believed to be small-pox, even though such belief is a mistaken one. A passenger suffering from delirium tremens, to the annoyance of the other passengers, may be ejected, on the same principle, without liability on the part of the common carrier.

It is the duty of a passenger to take a seat on the inside of a car if he can find one, and standing on the front or back platform of a car has been held to be contributory negligence, which would debar the passenger, if injured, from recovering damages. The employees of a street car company are required to exercise greater care where a passenger is forced to ride upon the step of a car, because he cannot find a seat inside. Precisely the same care is not due every passenger without regard to age, sex or bodily infirmity, because if a passenger is crippled, infirm or of tender years the carrier's duty must be performed with due regard to such condition.

Premature starting of a car or sudden jerking or jolting when stopping is negligence on the part of the common carrier. The weight of authority imposes the duty on the common carrier to announce each station at which a stop will be made. An announcement by a conductor or brakeman of the station the train is approaching is the ordinary method of warning the pas-

sengers that the train is nearing the station, so that they may alight at their destination. It is the duty of every traveler to ascertain upon purchasing his ticket and before boarding the train whether it will stop at all the stations on the route or only the principal ones. Passengers have the right to rely on the information given them by the ticket agent as to the stoppages of the train. A common carrier is liable in damages for failure to stop at a station at which it is scheduled to stop. The mere crowded condition of a train of cars is not a legal excuse for failure to stop a train at the station called for by the ticket of the passenger, for fear still more passengers would get on board. If a passenger wants to get off at a flag station, at which the train does not stop except on signal, the carrier will not be liable for carrying him to the next station, no matter how far distant, unless the passenger gave the conductor timely notice to stop at such flag station. Upon making a stop, proper warning of the departure of the train must be given. A call of "All aboard" made by a conductor or trainman prematurely is an invitation to board the train, and, if at such time it was unsafe to do so, the common carrier would be liable to any one misled thereby.

A railroad company is entitled to designate certain doors and steps by which its passengers shall leave its train, and is consequently not liable for injuries received by a passenger who attempts an unusual mode of egress. If a train or car has gone beyond the station platform, the passenger should request the conductor to back up the train to enable him to step on the platform. Jumping from a moving car which has passed a desired station will exempt the common carrier from liability. If a passenger is carried beyond his destination, he has the right to recover damages for the inconvenience, loss of time, and expense of traveling back. Failure to stop at the point called for by the passenger's ticket is not only breach of contract, but also negligence. If the train has passed the desired station, the passenger should request the conductor or other agent of the railroad to run the train back to the proper station. In one case a passenger carried beyond her destination, got off the train and attempted to walk back in the night time and was injured. Her right to recover was denied by the Court on the ground that it was the duty of the passenger to request the conductor to return to the station her ticket called for.

The publication of a time table by a railroad or other common carrier imposes the duty to have the trains arrive and depart

at the precise moments indicated. If a fireman neglects to get up steam in time to start a passenger train according to schedule, any passenger suffering loss by reason of such delay may recover damages therefor. For example, a theatrical troupe, lecturer or opera singer, prevented from reaching a destination in time to fulfill an advertised engagement, by the negligence of the common carrier, can recover such damages as can be proved. A case is made stronger, however, by notifying the common carrier of the urgent necessity of prompt carriage.

Carrier's Duty to Provide Seats.

It is impossible to go into all the intricacies of negligence as applied to common carriers, in a book of this kind; but as practically every one uses a public conveyance more or less, it is of the greatest importance to understand thoroughly the legal principles which regulate the rights and liabilities of common carriers and passengers. A knowledge and observance of the rules stated will tend to avoid considerable unnecessary trouble and expense.

The law requires a common carrier to provide its passengers with seats. This rule does not apply to street railway companies in the absence of special statutory provision. A passenger who accepts transportation on a railroad train is presumed to waive his right to a seat, and upon his refusal to surrender his ticket or pay fare, may be ejected, the passenger having no right to ride free if not furnished with a seat. If not provided with a seat, the passenger may leave the train and recover damages for the railroad's breach of contract. It has been held that a male passenger who has taken a seat in a car exclusively reserved for ladies cannot lawfully be removed from the train without being offered a seat elsewhere. It is obligatory on a conductor of a train to furnish a holder of a first-class ticket with a seat in a first-class coach.

Passenger's Baggage.

Passengers are permitted to carry with them, and a carrier is in duty bound to protect such articles of personal convenience and necessity, generally designated as baggage. Books bought for another person, cloth for a dress intended for a third person, deeds and legal documents, Masonic regalia, engravings, etc., have been held not to be baggage. A sportsman may take with him as baggage on an excursion in addition to his clothing, his

guns and fishing tackle, a musician his favorite instrument, and a mechanic his tools. But a railroad company is not obliged to carry as baggage a box of guns, a pianoforte or the tools of a machine shop, or stage costumes and scenery. The Supreme Court of Pennsylvania has decided that a passenger cannot recover for an embroidered table centerpiece of her own, and a dress belonging to her mother, carried with her own personal clothing. A distinction must be made between what is baggage and what is freight. The rule followed may be thus stated: Baggage consists of such articles as are usually carried by passengers for their personal use, comfort, instruction, amusement or protection. The length and character of the journey must be considered and the station in life occupied by the passenger. For instance, what might be considered as freight for a tramp or peddler would be construed as baggage if carried by a millionaire or United States Senator or Ambassador. Jewelry not intended to be worn on the person is freight.

APPLICATION FOR PATENT

Petition

To the Commissioner of Patents:

The petition of ¹

of _____ residing at _____ citizen
in the County of _____, State of _____
pray that Letters Patent may be granted to _____ for
improvement in _____

as set forth in the annexed Specification.

And _____ hereby appoint ²

of _____ Attorney,
Registration, No. _____
with full power of substitution and revocation, to prosecute this appli-
cation, to make alterations and amendments therein, to receive the
Patent, and to transact all business in the Patent Office connected
therewith. My Post Office address is _____

Signed at _____, in the County of _____
and State of _____, this _____ day of _____

19

Sign here, first name in full. 

Specification

To all whom it may Concern:

Be it known, That

_____ citizen
of _____, residing at _____
in the County of _____, and State of _____
has invented certain new and useful improvements in _____

of which the following is a specification

In Testimony Whereof, _____ affix _____ signature in
presence of two witnesses.

Sign here, first name in full. 

Two witnesses. 

Oath

State of

County of

} ss.

the above named petitioner, being duly sworn, depose and say that citizen of¹ and resident of in the County of and State of and that verily believe to be the original, first, and⁴ inventor of the improvement in

described and claimed in the annexed specification; that do not know and do not believe that the same was ever known or used before invention or discovery thereof; or patented or described in any printed publication in any country before invention or discovery thereof or more than two years prior to this application, or in public use or on sale in the United States for more than two years prior to this application, and that no application for patent on said improvement has been filed by or except as follows:⁵ representatives or assigns in any foreign country,

Sign here, first name in full. 

Sworn to and subscribed before me this

day of

19

(Official Signature.)

(Official Character.)

(L. S.)

NOTE—If executed before an officer who is not provided with a seal, the certificate of the clerk of a Court of Record must be affixed, showing the official character of such officer.

If the Inventor be dead, the oath will be made by the administrator, or executor, who will declare his belief that the party named as inventor was the original and first inventor.

¹ In case of the assignment of the whole interest in the invention, the application and oath must be made by the actual inventor, if alive, even if the patent is to be issued to an assignee. If inventor be dead, it may be made by the executor or administrator.

² If the power of attorney be given to a firm, the full name of each member of the firm must be inserted, or it will be ignored.

³ If the applicant be an alien, the oath will show of what foreign or sovereign State he is a citizen or subject.

⁴ If the applicants claim to be joint inventors, the oath will show "that they verily believe themselves to be the original, first, and joint inventors," etc. If by a single inventor, the word "sole" should be inserted.

⁵ If any such application for foreign patent has been filed more than seven months prior to this application the applicant will be required before the issuance of patent to state that no patent has been granted on the application so filed

ASSIGNMENT OF PATENT

Whereas,

did obtain Letters Patent of the
United States for

which Letters Patent bear date the *day of*
1 *and are numbered*

AND WHEREAS, *now sole owner* *of the said Patent and*
of all rights under the same

AND WHEREAS,

desirous of acquiring *interest therein:*

Now therefore, to all whom it may concern, be it known,
that for and in consideration of the sum of

to *in hand paid, the receipt of which is hereby acknowledged,*
have sold, assigned and transferred, and by these presents
do sell, assign and transfer unto the said *all the right*
title and interest in and to the said Invention, as secured to
by said Letters Patent, for, to and in

and in no other place or places: the same to be held and
enjoyed by the said

for *own use and behoof, and the use and behoof of*
legal representatives, to the full end of the term for which said Letters
Patent are or may be granted, as fully and entirely as the same would
have been held and enjoyed *had this sale and assignment*
not been made.

In Testimony Whereof, *have hereunto set*
hand *and affixed* *seal* *at* *in the County of*
and State of *this*
day of *A. D. 19*

Sealed and Delivered
IN THE PRESENCE OF

}

L.S.

L.S.

ASSIGNMENT OF PATENT LICENSE

This Indenture, Made this _____ day of _____, between _____ of _____, hereinafter called "the vendor," of the one part, and _____ of _____, hereinafter called "the purchaser," of the other part: Whereas, by license under seal dated _____, and made between _____, the licensor, of the one part, and the vendor, of the other part, the said licensor granted unto the vendor, and his assigns the sole and exclusive right within the city of _____ to manufacture articles according to the invention mentioned in said license, and the letters patent in respect thereof, for the residue of the term of fourteen years comprised in the said letters patent, at royalties payable half-yearly on every _____ day of _____ and _____ day of _____, and subject to the covenants and conditions therein contained; and whereas the vendor hath, from the date of the said license up to the present time, worked the said invention in the said city in accordance with the terms thereof; and whereas the vendor lately agreed with the purchaser for the sale to him of his business in the said city of manufacturing and selling the said articles, and the business of a _____ as from the said _____ day of _____ last; and whereas it was part of the said agreement that the purchaser should purchase the said license for the sum of _____ dollars; Now this indenture witnesseth, that in consideration of _____ dollars, he, the vendor, doth hereby assign unto the purchaser all that the said license and the full benefit thereof; to hold the same unto the purchaser and his assigns subject to the covenants and conditions therein contained, and henceforth on the part of the license to be performed or observed: and the vendor doth hereby covenant with the purchaser that, notwithstanding anything by him done or omitted or knowingly suffered, the said license is now valid and subsisting and not void or voidable, and that all the royalties reserved by the said license have been paid up to the _____ day of _____ last, and that all the covenants and conditions therein contained, and on the part of the licensee to be observed and performed, have been observed and performed up to this present time; and the purchaser doth hereby covenant with the vendor that he will, as from the said _____ day of _____ last, pay the royalties and other sums by the said license reserved, and also will perform and observe all the covenants and conditions therein contained and on the part of the licensee henceforth to be performed, and keep the vendor indemnified against all actions, claims, and expenses in respect of the said royalties, sums, covenants, and conditions, or any of them respectively.

In witness, etc.

PATENTS.

Patentable Invention—The Application—Caveats—Infringement.

THE subject of patents, trade-marks and copyrights, although more or less technical, is, nevertheless, of general importance and easily understood. We will, therefore, direct our attention to a brief analysis of the fundamental principles underlying this interesting and practical branch of the law.

Article I, Section 8, of the Constitution of the United States vests in Congress the power to promote the progress of science and the useful arts by securing for limited times to inventors the exclusive right to their respective discoveries, which power forms the foundation of our patent system. In pursuance of the authority vested in it by the Constitution, Congress has enacted various laws from time to time, the principal statute now in force being Section 4886 of the Revised Statutes, which provides as follows:

“Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings, obtain a patent therefor.”

Discovery and Invention.

The word “discovery” as used in the patent laws is synonymous with the word “invention.” Laws of nature can never be invented by man, although they may be discovered. When discovered they may be utilized by means of an art, a machine, a manufacture or composition of matter. Any idea which is new and useful, and which is the product of some exercise of the inventive faculties, is patentable. Every invention which is new and useful is not, however, patentable. A mere change of form, for example, does not constitute patentable invention. To illustrate, changing the body of a coal car from rectangular form

to conoidal form is not invention, because such change of form is only an application to the art of constructing car bodies of a principle of construction which was well known in other arts. It may be stated as a general rule that a mere change of size is not a patentable invention, but in the case of the invention of the safety lamp by Sir Humphry Davy the changing of the size of the perforations in the lantern case produced an entirely new and useful result, which entitled the inventor to protection. Ordinarily a mere change of proportions will not be patentable. Under certain circumstances such a change may be protected. Consider the case of combining India rubber and sulphur. Charles Goodyear discovered that when crude India rubber was combined with sulphur in small quantities, and the compound heated, it became what is known as soft vulcanized rubber, the properties of which were pliability and extensibility, the changed product being less affected by the heat and cold than crude rubber. Nelson Goodyear discovered later that if the proportions of the same two materials were changed by increasing the sulphur to twenty-five per cent. and upward of the rubber, the compound upon being heated lost the soft, pliable quality of crude rubber and assumed the properties of horn, being non-extensible and susceptible of being polished. Such a substance is known as hard rubber or vulcanite, and, although involving a mere change of proportions, was held to be patentable. It must be borne in mind, however, that if the change in proportions effects no change in the properties of the compound, or in its mode of operation, then the change is not entitled to protection by patent.

A mere change of material does not entitle the inventor to protection under our patent laws, but if such change imparts to a machine or device of any kind a new quality or property not previously possessed the same would be patentable. For example, the rolls on the old-fashioned wringers or washing machines used to be covered with cloth or felt, both of which were more or less elastic. The idea was conceived of covering the rolls with rubber, which was not only elastic, but also impermeable to water; this invention was of course a mere change of material, but gave to the machine such additional properties of general usefulness that it was held to be patentable.

Things not Patentable.

The mere change of location in the parts of a machine is not patentable, but if such change introduces a new mode of opera-

tion into the particular class of machines in which the change is made, or dispenses with part of an old mechanism, the inventor is entitled to a patent. A mere application of an old thing to a new purpose, or a double use of an old thing, is not patentable. As the term "patentable invention" is of such broad significance, we can better understand what is patentable by considering what is not. There are instances in which a change of application of an old thing to a new purpose amounts to patentable invention. For illustration, the annealing of articles of metal by first heating them to a sufficient temperature long enough to permit the molecules to assume the same condition throughout the mass, and by then compelling or permitting them to cool slowly, had been well known for a long time, and among such articles were the metallic specula of reflecting telescopes, which had been taken hot from the molds in which they were cast, put into a heated oven and had been permitted to cool slowly therein. With such knowledge in existence Whitney patented a process for annealing the chilled cast-iron wheels of railroad cars. A new and previously unknown result is obtained, namely, the relief of the plate of the wheels from inherent strain without impairing the chilled tread—a result which had not been obtained before Whitney's invention. This example shows that when an old thing is applied so as to obtain a new result (the production of a chilled car wheel free from internal strains), the change or thing done is not a mere application of an old process to a new or different thing, but is an invention which should be protected by a patent.

An invention comprising the substitution of one old device for another is not patentable, when the substituted device does no more than the device which it replaces. Thus the substitution of a circular saw in a shingle-sawing machine for the old-fashioned perpendicular saw was held to be patentable, on the ground that it was a most practical improvement, was useful and had not been known or used before.

It is a well-settled principle of patent law that there is no invention in the mere duplication of old devices. Where a new mode of operation is affected by duplication, the invention may be patented.

Under Section 4929, of the Revised Statutes, as amended May 9, 1902, any person who has invented any new, original and ornamental design for an article of manufacture, may, subject to certain conditions and limitations, obtain a patent therefor.

A useful art, as distinguished from the liberal, polite or fine arts, is a mode of treatment of, or a method or way of operating

upon an object by which a change in its form, quality or properties is produced. This art includes what are commonly called methods or processes, whether they be simple or compound.

Basic Idea of the System.

The patent system was founded for the purpose of stimulating improvements in the useful arts and sciences, by giving to inventors a monopoly upon the subject matter of the invention. The principal elements of a patentable invention is that it must be new and useful. As to the extent of the change that is required to constitute invention, the Courts have held that it is of no consequence whether the invention be simple or complicated, whether it be the result of accident or of long and laborious thought, or by an instantaneous flash of the mind. The law looks to the facts and not to the process by which it is accomplished. It gives the first inventor or discoverer the exclusive right to use it, and asks nothing as to the mode or extent of the application of his genius to conceive or execute it. Many of the patents or inventions which have been upheld are such slight changes from former modes or machines as to be tested in their material diversity chiefly by their results, such as the flame of gas rather than oil; the hot blast rather than the cold, charcoal used in making sugar, hot water in place of cold in making cloth. If in a patented improvement a new and useful result has been attained, neither the simplicity of the structure, nor the greater or lesser amount of intellect employed are of importance in determining the validity of the invention.

The law protects an inventor in the use of his invention for the period of seventeen years from its date. Applications for letters patent of the United States must be made to the Commissioner of Patents, and must be signed by the inventor, if alive. It is well before incurring the expense of an application to have a preliminary search made, which can be done at a very nominal cost. Any patent or other reference which would constitute an anticipation of the inventor's idea will be developed in such search, and the patentability of the invention determined.

A complete application comprises a petition, specification, oath and drawings. A model is sometimes, though rarely, required. The petition must be addressed to the Commissioner of Patents and must set forth the name, present nationality, residence and present postoffice address of the petitioner, and request the grant of a patent for the inventor, and not of an

assignee of the inventor, although it may request that the patent, when granted, shall be granted to an assignee.

Specifications.

The specification is a written description of the invention or discovery, and of the manner and process of making, constructing, compounding and using the same, and is required to be in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which the invention or discovery appertains, or with which it is most nearly connected, to make, construct, compound and use the same. It is further required that in the specification must be set forth the precise invention for which a patent is solicited, and explain the principle thereof, and the best mode in which the applicant has contemplated applying that principle, in such manner as to distinguish it from other inventions. In a case of a mere improvement, the specification must particularly point out the parts to which the improvement relates, and must in explicit language distinguish between what is old and what is claimed as new; the description and drawings, as well as the claims, should be confined to the specific improvement and such parts as necessarily co-operate with it. The specifications must conclude with a specific and distinct claim or claims of the part, improvement or combination or discovery. When there are drawings the description will refer to the different views by figures, and to the different parts by letters or numerals. The rules of practice of the United States Patent Office require that the following order of arrangement should be observed in framing the specification:

1. Preamble stating the name and residence of applicant and title of the invention;
2. General statement of the object and nature of the invention;
3. Brief description of the several views of the drawings;
4. Detailed description;
5. Claim or claims;
6. Signature of inventor;
7. Signatures of two witnesses.

It is not necessary that an applicant should be represented by an attorney, but in view of the fact that the value of the patent, as a monopoly, depends upon the care with which the claims are drawn, it is advisable to employ an attorney, whose technical knowledge and experience qualify him to better protect

the invention. An inventor may, by directing a letter to the Commissioner of Patents, secure a copy of the rules of practice of the Patent Office, with forms for the different parts of an application.

Two or more independent inventions cannot be claimed in one application, but where distinct inventions are dependent upon each other and mutually contribute to produce a single result, they may be claimed in one application. If several inventions claimed in a single application, be of such a nature that a single patent may not be issued to cover them, the inventor will be required to limit the description, drawing and claim of the pending application to whichever invention he may elect. The other inventions may be made the subjects of separate applications, which must conform to the rules applicable to original applications.

Applicant's Oath.

The oath is a very necessary part of every patent application. The applicant must make oath or affirmation that he verily believes himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition or improvement for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used, and shall state of what country he is a citizen, and where he resides, or whether he is a sole or joint inventor of the invention claimed in his application. In every original application the applicant must distinctly state under oath that the invention has not been patented to himself or others with his knowledge or consent in the United States or any foreign country for more than two years prior to his application for a patent filed in any foreign country by himself or his legal representatives or assigns more than twelve months prior to his application.

Whenever, the nature of an invention admits of it, a drawing must be furnished by the applicant. A model is only required when the examiner of the application is unable to fully understand the operation of the invention from the drawings.

Applications filed in the Patent Office are classified according to their various arts and are taken up for examination in their regular order of filing. The applicant is notified at the proper time whether or not his application is accepted or rejected.

If rejected, the reasons will be fully and precisely stated and such information and references will be given as will be useful in aiding the applicant to judge of the propriety of prosecuting his application or of altering his specification.

The applicant has the right to amend before or after the first rejection or action; and he may amend as often as the examiner presents new references or reasons for rejection. An amendment must be filed within one year after the last rejection by the Patent Office, otherwise the application becomes forfeited.

Costs.

Every application for a patent must be accompanied by a payment of fifteen dollars as a filing fee to the government. After an application has been allowed, a final fee of twenty dollars must be paid at any time within six months after receiving formal notice of allowance. The cost of drawings and attorney's fee vary according to the nature of the invention. The average cost of a patent, including a preliminary search, is about eighty-five or ninety dollars.

Reissue of Patents.

The law provides that a patent may be surrendered and reissued to the original patentee, his legal representatives or assigns, whenever the original patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his invention or discovery more than he had a right to claim as new, provided the error arises from accident or mistake.

An inventor, upon filing his application, should mark his machine or device "Patent Applied For." He cannot sue for damages for the infringement of his invention until the patent has issued, but the above marking serves as a notice to the public that protection is sought. Thus a possible infringer would be warned not to commence the manufacture of the invention, because he could be prohibited from selling same as soon as the patent has issued.

BANKS AND BANKING.

Subjects Defined—Deposits—Loans and Discounts—Certified Checks—Officers and Agents—Savings Banks—Clearing House.

FROM a practical standpoint there is no subject of greater importance to the business public than that of banks and banking, and we will therefore direct our attention briefly to an inquiry of the general principles regulating this branch of business.

A bank has been legally defined as an institution for the deposit of money, with power to issue its promissory notes, intended to circulate as money (known as bank notes) or to receive the money of others on general deposit; to form a joint fund that shall be used by the institution for its own benefit, for one or more of the purposes of making temporary loans and discounts; of dealing in foreign and domestic bills of exchange, coin, bullion, credits, and the remission of money; and with privileges in addition to these powers of receiving deposits and making collections for the holders of negotiable paper. At common law banking is open to every individual and originally consisted only in receiving deposits, such as bullion, plate and the like, for safe keeping, until the depositor should see fit to draw it out for use; but the business was gradually extended to include the discounting of bills and notes and the loaning of money on mortgage, pawn, or other security, and in recent times to the issuing of notes of their own intended to circulate as currency or a medium of exchange instead of gold and silver.

As a matter of public protection, the Legislatures of practically every State have forbidden individuals or firms from engaging in the banking business unless they conform to the particular laws relating thereto. In common parlance a bank is understood to-day to be a corporation authorized by either the National or State Government to conduct the banking business or the business of establishing a common fund for lending money, discounting notes, issuing bills, receiving deposits, collecting the money on notes deposited and negotiating bills of exchange. Should several individuals assume to engage in banking without complying with the law, hold meetings, elect

directors and the like, they may be held civilly liable as partners and criminally liable as individuals.

In Pennsylvania a banking department is established by statute, the duties of which are to take care that the laws of this Commonwealth in relation to banks and banking companies, co-operative banking associations, trust, safe deposit, real estate, mortgage, title insurance, guarantee, surety and indemnity companies, and all other companies of a similar character, having power to receive money on deposit, shall be faithfully executed.

Deposits.

A bank is not bound to receive on deposit the money and funds of every person who offers, but may arbitrarily select its customers from among those that apply. Statutes in many States impose certain restrictions on this power of discrimination. Discounting or loaning money, with a deduction of the interest in advance, is a part of the general business of banking, and, although a bank is no more exempt from the operation of the usury laws than an individual, yet it has been held that taking the legal interest upon loans in advance is not usurious.

Deposits made with bankers are either general or special. A special deposit is where something is placed in the charge or custody of the bank, of which specific restitution must be made. A general deposit is said to amount to a mere loan, and the bank is to restore not the same money, but an equivalent sum, whenever it is demanded. As regards general deposits, the relation of banker and customer is that of debtor and creditor. But in the case of a special deposit the bank is merely the bailee of the depositor and has no authority to use the thing deposited. Where valuables are deposited as collateral for a loan, the bank is only bound to take ordinary care of them, and accordingly will not be held liable where burglars break in and steal the securities, in the absence of gross negligence.

It may be stated that a bank has a general lien on all moneys, funds and paper securities of a depositor in its possession for the amount of the general balance. A bank has the right to set off as against a deposit only where the individual who is both depositor and debtor stands in both these characters alike, in precisely the same relation toward the bank. Hence an individual deposit cannot be set off against a partnership debt.

A deposit in forged bills or counterfeit coin creates no indebtedness, although credited to the depositor's account; pay-

ment in such could not discharge a debt and cannot create one. A bank is bound to know its own notes, and where it receives and gives credit for notes purporting to be its own it cannot, after the lapse of a reasonable time, repudiate them on the ground that they were forged or fraudulently altered.

The entry in a bank book by the proper officer of the amount and date of the deposit is *prima-facie* evidence that the bank received the amount and binds the bank the same as any other form of receipt. However, the entry is only a receipt, and is open to explanation, and if shown to be a mistake is no longer binding upon the bank. Likewise the receipt is open to correction by the depositor if shown to be erroneous.

A certificate of deposit is the written acknowledgment of the bank that it has received from a certain person a certain sum on deposit. Ordinarily it is a simple receipt of the bank, in negotiable form, for so many dollars, and has been held to be in fact equivalent to a promissory note. In Pennsylvania the authorities are somewhat to the contrary of this doctrine, our Supreme Court having held that a certificate of deposit is not a promissory note so as to make an indorser liable on his indorsement to the holder, but is a special agreement to pay the deposit to anyone who should present the certificate and the depositor's order.

The certifying of a check is in effect merely an acceptance and creates no trust in favor of the holder, and no lien on any particular assets of the bank which certifies it. In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor, and if it failed to apply it at all, or misapply it, it can be recovered as a trust deposit. Deposits made by trustees, executors, administrators, etc., are regarded as general deposits, and if the bank fails to pay them, the beneficiaries have no peculiar claims or rights over other creditors. They must share like other general depositors. The deposit of mortgages and other special instruments for collection or the drawing of a draft on a debtor and giving it with specific instructions to collect and remit, constitute a trust transaction, and the money, if collected, becomes a trust fund, which must be paid in case of the failure of a bank before general depositors.

Trust Funds.

When commercial paper is received for collection a trust relation exists. This relation may be changed by agreement or

custom into that of debtor and creditor after the collection of the proceeds, but a bank cannot divest itself of the trust relation at its own convenience.

Quite frequently trustees mingle a trust fund or several trust funds with their own deposit in an individual account. Such conduct, although criticised by the Courts, is not in fact wrongful, and a bank, although knowing that this is done, is not at fault. The circumstance, however, is suspicious and should impel the institution to exercise caution in the payment of checks drawn against such mingled funds. If a bank learns that a trustee is committing a breach of trust by an improper withdrawal of funds or participates in the fraud, it becomes liable. The weight of authority throughout the United States is to the effect that if a bank receives a check payable to a depositor as a trustee and credits it to his personal account and permits him to draw it out on his personal check, it is liable with him for a breach of the trust.

The law presumes that a deposit belongs to the person in whose name it is entered, and the bank cannot question his right thereto. The Supreme Court of Pennsylvania has frequently decided that if a deposit in the name of one can be claimed by another, the burden of proof is on such other to establish his or her ownership. If, therefore, a deposit is attached either because its title is claimed by another or to secure a debt due from the depositor to the attaching creditor, the bank should do nothing until the Court has made an order naming the person to whom the bank should pay.

A bank being in law a debtor, is absolutely liable for the loss of a general deposit, although such loss occur by events wholly beyond its control, but if the bank fail, a general depositor is not a preferred creditor in the absence of special statute.

Power to make collections upon business paper is incidental to the banking business. A bank upon accepting the agency for this purpose is bound to exercise reasonable care and diligence in the discharge of its assumed duties. The measure of damages resulting from its neglect of duty will be the amount of actual loss the party interested has sustained. When a bank receives a note for collection, it is bound to use reasonable skill and diligence in making the collection, and for that purpose is bound to make a reasonable demand on the promisor, and in case of dishonor to give due notice to the indorsers, so that the security of the holder shall not be lost or essentially impaired by the discharge of the indorsers. The bank must use due diligence in

taking all necessary steps by presentment, demand, protest and notice, to fix the liability of all the parties to whom its principal has a right to resort for payment; and if the bank fail in any of these duties, it becomes liable in damages. Instructions given to a bank taking a note or bill for collection, where the collection is to be made in a distant place, must be transmitted to its correspondent. If a note is payable at the bank to which it is indorsed for collection no demand is necessary.

After collection, the bank may either keep the money separate from its other funds, as a special deposit, for which it will be liable as a mere bailee, after notice to the owner, or it may place the amount to the depositor's credit, and mingle it with its other funds, when it will be liable to the holder, as a simple contract debtor.

How far a bank is liable for the negligence of a correspondent bank to which it has sent commercial paper to be collected is a question upon which there is a great conflict of authority. It is held, on the one hand, that the bank first receiving the paper is answerable for the neglect, omission or other misconduct of the bank or agent it may employ, following the general rule of law that an agent is liable for the acts of a sub-agent employed by him. This is the doctrine established by the decisions of the Supreme Court of the United States and the Courts of several other States. But it is held, on the other hand, that the liability of a bank taking a note or bill for collection which is payable at a distance extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the correspondent bank is the agent of the holder, and that the transmitting bank is not liable for the defaults of its correspondent when selected with due care. This doctrine has been adopted by the Courts of Pennsylvania, and is approved by the leading text-book writers.

The Subject of Loans.

When a bank has issued a letter of credit to a correspondent bank announcing a credit for a stated sum for the use of the holder of the letter, it cannot, after learning of the insolvency of the bank to which the letter is directed, retain the funds for a debt due therefrom. A letter of credit is a guaranty, and a bank can ordinarily recover for all advances made thereon in good faith and within the terms of the letter of credit.

Loans and Discounts.

The majority of questions regarding the authority of banks to make loans resolve themselves into an interpretation of the charter organizing the bank or statutes regulating its operations. Power to lend must be defined by positive law, and, when no prohibitory statute exists, a commercial bank can lend money on real estate security, and a bank having authority to lend on public stocks, on bonds and mortgages, or on any other securities deemed ample by the board of directors, can also discount on commercial paper. The purchase of a promissory note for less than its face value is a discount, but one taken in payment of a pre-existing debt is not. It is well settled that when a note is purchased or discounted the bank does not become the owner until it has paid therefor, and until then its possession is a bailment, and it cannot apply the proceeds to extinguish other indebtedness of the borrower without his consent. However, if the borrower should fail before he draws his money the note can be tendered back and the money retained, and a bank will not be liable to the holder of a check representing the amount which was not presented before the holder's failure. In discounting a negotiable note a bank is not required to exercise care to ascertain whether there are equities or defenses.

If a bank is prohibited from lending to its officers, a loan to a firm, a member of which is a director of the bank, is not a violation of the law. But if the charter of a bank provides that only such loans can be made to directors as the by-laws shall authorize and a loan is made to a director without any by-law regulating the condition, the loan is void and the money cannot be recovered.

If a State lends money to a bank on bonds it has power to guarantee them. A person who has borrowed money from a bank cannot avoid payment on the ground that his loan was not made by a quorum of directors as required by law.

It is important to observe that a bank cannot lend its credit to another, or pledge its property to secure the debt of another, if it has no interest therein. When loans have been made by banks, which loans are unauthorized, the weight of authority is to the effect that such loans should be paid by the debtors and that the lenders who have offended in making such unauthorized loans should be punished in some other way than by withdrawing the aid of the Court to enforce payment. Where money is left with a bank to be loaned, the bank is an agent and not a debtor,

and if the money is loaned in good faith and the bank has exercised reasonable care it is not liable to the borrower should there be any loss. The Courts have ruled that a banker who promises to exercise careful attention in conducting the business of his customers is bound to exercise the skill usually shown by a banker in loaning money for a customer, even though the service be rendered gratuitously; but a failure to inquire carefully into the condition of a borrower would not be negligence if he was generally believed to be solvent and an inquiry would have yielded no information.

Security for Loans.

Incidental to the power of discounting notes, etc., is the power to secure loans in any manner which is not prohibited by law. If a loan is illegal this fact will not affect the titles to the securities which were transferred as collateral for the loan. The borrower cannot, therefore, while retaining the money, restrain the bank from negotiating the securities or obtain their cancellation or returns.

If a draft is discounted by a bank to which a bill of lading, properly indorsed, is attached, a special property on the merchandise described in the bill of lading passes to the bank as security which is preserved until the draft is accepted and paid. In many States banks have been forbidden to loan money on the security of their own stock and where a statute declares that a bank shall not make a loan or discount on the pledge of its own stock, this means directly to the owner and does not forbid a discount to a third party who has no interest in the stock.

Banks are ordinarily permitted to take mortgages, to secure debts made either at the time or afterwards, and it can afterwards take such property to secure its debt either by foreclosure, by sale on execution, or by other process for the purpose of selling it at better advantage. A bank which is forbidden by its charter to deal or trade in anything except bills of exchange, etc., is not forbidden from taking an assignment of a mortgage to secure a debt due to the bank.

Authority is given in many States to a bank to take a mortgage on land to secure the payment of its stock, and such mortgages are regarded as prior to mortgages for loans, although both may be made in the same instrument. The transfer of bank stock subsequently to the transfer of real estate subject to a mortgage of this character does not affect the mortgage rights of the bank.

A note made in one State and discounted in another is governed by the law of the latter State. Regarding the interest or rate of discount which a bank may charge, it is governed by the same law as individuals. The laws relating to usury do not apply to the purchase and sale by a bank of promissory notes and other instruments. As a matter of fact, it has been held that a bank may take a note bearing more than the legal rate of interest as security for a prior debt, although this right is not at all free from doubt. A new note or bill given in renewal of an old note or balance tainted with usury, is usurious.

Checks.

Although it has been held that a depositor can withdraw his deposit without a written order as a strict matter of right, it is the universal custom of banks to require a written order from the depositor. Until a check has been presented to a bank and payment refused and notice of dishonor given to the maker, the holder has no right of action. In view of the fact that a check is a written contract, oral statements cannot be used as evidence to contradict or vary the check. However, as between the original parties to the check, such evidence may be given to solve any ambiguity, as, for example, to show what bank or person was intended, or to show in what capacity the drawer or maker signed. Where the amount stated in marginal figures differs from the words in the body of the check the latter will govern.

When the maker of a check has no funds in bank, or has withdrawn them, or has stopped payment of the check, notice of dishonor is unnecessary. The general rule of law is that the holder of a check cannot fasten liability on the maker until he has first presented the check to the bank (drawee) for payment, and has given prompt notice of dishonor.

It should be most carefully borne in mind that the holder of a check, in order to charge the drawer in case of a dishonor, must present the check for payment within a reasonable time, otherwise the delay is at the peril of the holder. What is a reasonable time will depend upon circumstances, and will, in many cases, depend upon the time, the mode, and the place of receiving a check, and upon the relations of the parties between whom the question arises. A majority of the States have enacted negotiable instrument acts which regulate this question. If the bank on which the check is drawn be in the same place where

the payee received the check, it should be presented at once for payment within banking hours on the day it is received, or on the following day. If in the meantime the bank fails, the loss will be the maker's. A check is generally designed for immediate payment, and not for circulation; therefore it becomes the duty of the holder to present it for payment as soon as he reasonably may, and if he does not, he keeps it at his own peril. If the bank is not in the same place where the payee receives the check, then it must be forwarded by mail on the next secular day after it is received for presentment. If the person to whom it is forwarded presents it for payment on the day after it has reached him by due course of mail, it will be sufficient.

A check given in the ordinary course of business for a debt is not payment until it is paid. If payment is refused without the holder's fault or negligence, he may sue on the original indebtedness. The holder is merely the agent of the maker in getting the money to pay his debt. The acceptance of the check of a third party is regarded in the same manner.

A check may be either ante-dated or post-dated. An ante-dated check is payable immediately. A post-dated check, or one which bears a date subsequent to that of its actual issue, is payable on or at any time after the day of its date. Checks are not payable in the order of priority in which they are given, but in the order of their presentation for payment. The rule is "First come, first served." If a post-dated check falls due on Sunday or on a legal holiday, payment cannot be demanded until the day following, and if the bank pays it before that time, it acts at its peril. The presumption raised by a post-dated check is that the maker has an inadequate fund in the bank at the time of giving it, but will have enough at the date of presentation. It is valid, but a bank ought not to pay it, if presented earlier, until the date mentioned; if it does the depositor can recover his money. If transferred by the holder to another for a good consideration before the date for demanding payment, he may recover of the maker, although there was no consideration for the check in the beginning.

A memorandum check is defined as a contract by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and non-payment should be given. The word "memorandum" written or printed upon the check describes the nature of the contract with precision. It is an express waiver on

the part of the maker of the check of any objection against the claim of a *bona fide* holder that it had not been presented for payment, or if it were presented and not paid, that he had had no notice of the non-payment of the bank named therein. As between the bank and the payee a memorandum check is just like an ordinary check. The bank is not bound to pay any attention to the word "memorandum" or the abbreviation "Mem." written on the check, or to recognize any contract as implied by them between the maker and payee which gives to the check any peculiar character. It has been held in New York State, that the alleged custom of Wall street that an ordinary check upon a bank is to be converted into something contrary to its legal effects by writing "Mem." in one corner thereof, amounts to nothing. In reality, according to very respectable authority, a memorandum check amounts to nothing more than an indication of an understanding that the check is not to be presented immediately for payment, so as to destroy the drawer's credit with the bank when he has not provided funds to meet same.

A check signed by an individual, with the word "Agent," "Treas.," or other descriptive term has sometimes been regarded as his individual check, and he alone was held to be bound. However, by the modern doctrine, the Courts look at the intent of the signer, and if he is in fact an agent, trustee or officer of some principal, the Court will give that effect to them. In Pennsylvania the strong tendency is to hold that an official does not bind himself personally.

A bank must ascertain that the party presenting a check is the one entitled to receive payment, under penalty of refunding the amount either to the party really entitled or to the drawer. If a bank pays a forged check to a holder without fault, who, in ignorance of the fraud, pays value for it, the money cannot be recovered back. A partnership deposit cannot be drawn on the check of an individual partner.

The practice of certifying checks has grown out of the business needs of the country, and is now so thoroughly established that its legality cannot be questioned. It enables the holder to keep or convey the amounts specified with safety and furthermore enables persons not well acquainted to deal promptly with each other, and avoids the delay and risks of receiving, counting and passing from hand to hand large sums of money. It has

been computed by a competent authority that the average daily account of such checks in use in the city of New York throughout the year is not less than one hundred million dollars. The certification of a check by a bank is equivalent to an acceptance of a bill for that amount and binds the bank to hold sufficient funds of the drawer to meet the check. The theory of the law is that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well regulated bank adopts this practice to protect itself. It follows that after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his. In other words, a certificate that a check is "good" operates as an engagement of the bank to pay the debt as its own; the bank becomes the principal debtor and the drawer is discharged. The law of demand and notice has no application to certified checks, and the bank becomes so far the primary debtor that no delay, until the Statute of Limitations has released the certifying bank, will affect the obligation to pay the holder. No particular form of certification is necessary. Ordinarily the bank officer writes on the check the word "good" or its equivalent, and sometimes adds his name or initial.

If a bank certifies a check to be good by mistake, under the impression that the drawer had funds on deposit, and notifies the holder in sufficient time to prevent any loss in consequence of the error, the Courts have held that the bank is discharged from liability on its certificate.

It is provided in the Negotiable Instrument Act of Pennsylvania that a check does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.

If the drawer should withdraw his deposit before the presentation of his check for payment, although after a reasonable time had elapsed for presenting it, he would still be liable. Nothing short of the retention of his deposit there until the bank's failure, or until the Statute of Limitations has released him, operates as a discharge of the debt. It sometimes happens that a deposit is insufficient to pay a check in full, in which event a bank may decline to pay it at all; although it may, if it wishes, credit the amount of such deposit on the check, though this is seldom done. If a bank pays a check to a holder who has committed no fraud, it cannot recover of the holder, if in fact there

was not a sufficient deposit, in which case the bank must look to the drawer.

The law is well established to the effect that if a bank neglect or refuse to pay on the order of a depositor, where the latter has sufficient funds on deposit, the depositor can maintain an action against the bank for the money, and is entitled to recover substantial damages for such refusal. When a drawee bank (the bank on which a check is drawn) has paid a depositor's check by remitting the amount by draft in a letter mailed to the bank from which the check was received, and afterwards learns of the depositor's insolvency or the insufficiency of his deposit to cover his check, this is usually regarded as in legal effect a delivery to the sending bank and beyond the sender's recall.

As a general rule, the drawer of an uncertified check can revoke his order at any time before the bank's acceptance thereof, and the bank is bound by such revocation. In such case, however, the drawer is liable to the holder for the consequences of his conduct. Ordinarily the death of the maker of a check will operate as a revocation; but, notwithstanding this, if a bank pay a check after the drawer's death and before learning of the event, it is not liable. In those jurisdictions where a check is regarded as an assignment of the funds to the amount thereof the death of the drawer would not be regarded as a revocation.

It is fraudulent for the drawer of a check to have it certified after he has become insolvent. If this is done, the certifying bank has a right to reclaim or countermand the payment of the check, unless it has been previously transferred to an innocent holder. A *bona fide* holder of a check or other negotiable instrument which is transferable by delivery acquires a good title even from a thief or finder. A bank, consequently, is protected by the law in paying such a check or other commercial paper in the absence of notice.

In case a depositor is indebted to a bank and his deposit is sufficient to meet the obligation, and it has not been specifically appropriated by him to be held for a different purpose, the bank has a right to apply such deposit to the payment of the debt. The general lien of a bank upon a customer's deposits will not be recognized where the circumstances are inconsistent therewith. Thus, for example, where securities are lodged with the bank for a particular purpose, as where they are pledged as collateral to cover a particular loan or debt, they cannot be retained by the bank for the general balance or for the payment of other claims. A bank cannot apply a deposit to an indebtedness which has not

matured. A bank that gives a customer credit to a specified amount, which is to be secured by collections, cannot divert and suspend payments made on other notes until the maturity of such credit.

Banking Regulations.

Statutory regulations for conducting the banking business may be supplemented by every bank with such other regulations, in harmony with law, as its interests may require. Such regulations or by-laws are regarded as a contract between the bank and its customers. The officers of the bank are presumed to know them and are bound thereby so far as they determine the relation between the bank and themselves. The stockholders likewise are presumed to know the by-laws of the bank. As a contract relation between bank and depositor exists, the terms of which are largely embodied in the by-laws of the bank, their alteration by the bank alone, without the consent of the depositor, is a somewhat arbitrary exercise of authority. Yet by-laws that provide for reasonable amendment, without consulting the bank's depositors, have on several occasions been declared valid.

Authority to make and amend by-laws vests in the stockholders of a bank, who in turn may delegate their authority to the directors.

Usage plays a very conspicuous part in the law of banking. It has no inflexible boundary; it may apply to a bank or to all banks of the community; it cannot be suddenly created nor, save by statutory change, suddenly disappear. Custom is a law established by long usage. A universal custom becomes common law. No contract or agreement can modify a law, but where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Statutory provision designed for the benefit of individuals may be waived; but, where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual.

Individuals living in the same community with banks are supposed to know bank usages, and are presumed to act accordingly in doing business with these institutions, whether they have actual knowledge of the existence of the usages prevailing among them or not. The general course of business in a community, including the universal practice of banks, is a matter of which the Courts will take judicial notice.

Officers and Agents.

The manner of selecting the directors of a bank is generally controlled by its charter, but when they are once elected their authority continues until successors are chosen and duly qualified. The president and other executive officers of a bank are chosen by the directors. The election of an individual to the presidency or other office of a bank by a majority of the quorum of the Board of Directors is valid. Title to office vests as soon as the vote of the majority of the directors is declared. The directors of a bank ordinarily have authority to appoint special agents and they may also confer a special agency on the bank's regular officers. Statutes in most States require all bank officers to enter bonds. If an officer is promoted, thereby incurring greater responsibility and his bond is not changed, his sureties are released for any defalcation in the higher office.

The compensation of the principal officers of a bank is usually fixed by resolution or agreement of the directors, or by-laws of the stockholders. Unless thus fixed, they are entitled to no compensation for performing the ordinary duties of their office. When once fixed, no increase for a past service however valuable, can be allowed, although this rule has been somewhat modified. A bank's president who is authorized to act as a receiver, is not thereby forbidden to thus act in his individual capacity; nor is he, when thus acting, obliged to account for his compensation to the bank on the ground that it is entitled to his entire service. Should a bank become insolvent and the president be appointed receiver, he cannot continue to draw his presidential salary, nor, in fact, can any of the officers continue to draw theirs. They can, however, prove their claims for salaries like other creditors.

Every bank officer, including every director, of course, is an agent of the bank, and the acts of the directors are regarded as corporate acts, while the acts of other officers are governed by the general rules of agency. They have authority to act in accordance with the general usage, practice, and course of their business; and when thus acting they bind their bank in favor of third persons who have no knowledge of any narrower limitations of their powers. It has been held that a bank is liable for a loan obtained from another bank, although the officer who borrows the money acts without the knowledge of the other officials and appropriates the money to his own use. When the president of a bank acts in good faith in discounting paper he is not liable for

the consequences, but he is liable if he lends to a minor or other person against whom payment cannot be enforced. A bank is not liable for slander consisting of unauthorized declarations of its cashier concerning the condition of the account of a customer.

The relationship existing between the directors and the stockholders of a bank is purely a trust relationship and the directors can only use the funds of the bank for legitimate banking purposes. The directors of a bank are bound to exercise ordinary skill and diligence, and are liable for losses resulting from mismanagement of the affairs and business of the bank, but for excusable mistakes concerning the law, and for errors of judgment, when acting in good faith, they are not liable. It is the duty of the Board of Directors to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community has the right to assume that the directory of a bank does its duty, and to hold them personally liable for neglecting it. Their contract is not alone with the bank. They invite the public to deal with the bank, and when anyone accepts their invitation he has the right to expect reasonable diligence and good faith at their hands.

The president of a bank, by virtue of his office, has authority to take charge of the litigation of the bank, and may answer and defend suits against it and employ counsel in its behalf. In the absence of authority, the president cannot dispose of the cash or credits of the bank for the purpose of settling the demands of its creditors.

The directors of a bank can act only as a Board in conducting its business. Their separate assent to any action is not the assent of the corporation. The meetings of directors are largely regulated by statute and by-law. A long-established custom of holding meetings and transacting business at the bank during business hours whenever a sufficient number are present serves as a standing notice to each director, and they can proceed to transact business unless a by-law prescribes a different course.

Directors of a bank often have a personal interest in business which as directors they are required to pass upon. A director of a corporation, like any other trustee, is bound to act in the utmost good faith toward his beneficiary, and is forbidden to take part in any transaction concerning the trust in which he has an interest adverse to that of his beneficiary; but he is not absolutely precluded from dealing directly with the corporation of which he is director.

It has been held that should the president or other officer make a loan to himself, the knowledge of which should subsequently come to the directors and pass without objection, their silence would operate as a ratification.

A duty imposed upon the Board of Directors by statute to be personally performed cannot be delegated to a committee or agent of a bank. They may delegate certain powers by the enactment of a by-law or a resolution, and thereby confer executive authority upon a committee or an agent, but where the statute or charter of a corporation specifically defines an act or duty to be performed by the directors, they have no power to set aside the law, and appoint agents to do the very thing which the law requires them personally to perform. They cannot delegate to an officer of the bank sole authority to make discounts or, in other words, they cannot give unlimited power to an officer to loan funds of the bank to any person or persons who might make application therefor.

Directors as Trustees.

The directors are held by a majority of the Courts at the present time to be the trustees of the funds and property of the banking corporation, and such funds cannot be loaned nor invested without authority of the Board of Directors, who are held responsible for them. Loans and discounts may be authorized, and the executive part of the business performed by the cashier, president, or other agent of the bank, but the officer has no inherent authority in the absence of a resolution or direction coming from the Board of Directors to make loans to any person or persons. The directors may, by a single resolution, authorize the cashier to make loans to a certain person, firm, or corporation, up to a certain amount, and in this manner delegate their authority, but beyond this it has been held that a general resolution passed by the Board of Directors authorizing the cashier to discount notes and make loans generally, to those making application and desiring to borrow, is not within their power or authority. If loans have been made by an officer of the bank without authority obtained from the Board of Directors, they may afterward be ratified by the Board and such ratification legalizes the act.

Discounting notes is the principal business of a bank; its resources almost entirely consist of its bills receivable. The deposits of the bank are placed with the bank by the depositors

upon an implied theory that when an investment or loan is made, they are to be loaned and invested by the trustees or directors with reasonable care and diligence. The making of the investments for the bank is a duty belonging altogether to the Board of Directors. The directors are consequently precluded, by the acceptance of the trust, from making any use of their power or of the corporate property for their own advantage. The well-known and established rule of law is that the directors must manage the business of a bank as directed by the law and the bank's charter. If they fail to perform this duty in good faith they will be held liable for the losses to the stockholders and directors. Directors may commit the ministerial work of the bank to officers duly authorized to perform the same, but this does not absolve them from the duty of reasonable supervision or shield them from liability for the wrongdoing of such official, if through gross inattention the wrongdoing has escaped their notice.

The general rule is that directors of banks are acting as trustees and as such are supposed to serve without compensation. A governing statute may allow them to regulate their own compensation, but in the absence of a statute or by-law their services are supposed to be gratuitous. They cannot vote themselves salaries, because such a resolution is void, being a promise without a consideration.

The Bank President.

The executive business of a bank is conducted by its president, vice-president, cashier and secretary. In some cases the president of a bank is expected to devote only a portion of his time to the business, and is not required to exercise the same degree of care and foresight as a president who is the real head and manager and who possesses all the authority of the cashier. He may, however, be authorized by the directors to do anything within the authority of the bank's charter except those positive requirements that are personal and cannot be delegated; but when he goes beyond the scope of his usual authority it must be shown that in some way his act was authorized by the directors. The authority of the president during the cashier's absence has often been questioned, but custom ordinarily governs in such cases, and it may be stated generally that whatever the cashier can do the president can do during his absence.

The duties of a president, as his office indicates, are execu-

tive. He should preside at all meetings of the Board of Directors; he should frequently examine into the condition of the bank's affairs, making a searching and thorough examination, taking off a balance, counting the cash, and generally making a careful inspection of all the books. If this practice is maintained employees will seldom, if they are so inclined, attempt malfeasance. A bank that has for its president one that will faithfully follow this practice, if otherwise judiciously managed, should never be compelled to go into involuntary liquidation. His executive powers are limited by the charter and by-laws, but in the holding of the office he is regarded as having charge of the affairs of the bank. His acts must be authorized, acquiesced in, or subsequently ratified by the Board of Directors in order to bind the bank.

The president of a bank should not be permitted to borrow its funds without the consent of the finance committee, and in the absence of such a committee the loan should be passed upon by the Board of Directors.

The Cashier.

The cashier is the agent of the bank and not of the directors; his acts are binding on his bank, and those who deal with him are presumed to know the extent of his general powers. His conduct outside his official sphere which is not criminal or contrary to public policy, if known and accepted by the bank, is binding thereon; and, even though contrary to law, the bank is bound if the act done by the cashier was by the authority of the Board of Directors. The cashier of a bank is supposed to be the thermometer of the bank, and should be able to denote the condition and financial temperature of the same at any time. It should be his imperative duty to examine daily the balance books, and as frequently as possible inspect the work of clerks and keep himself informed concerning the business of the bank.

The duties of a cashier depend in a degree upon the conditions surrounding the bank. The location and volume of business which the bank has may enlarge or lessen the detail of labor and his responsibility. The Supreme Court of the United States has defined the powers and duties of the cashier of a bank as follows: "The cashier is the executive officer, through whom the whole financial operations of a bank are conducted. He receives and pays out its moneys, collects and pays its debts and receives and transfers its commercial securities. Tellers and other subordinate

officers may be appointed, but they are under his direction and are the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing."

Although it is one of the usual powers of a cashier to certify checks, the certification of his own checks is utterly void, even though he has money to his credit in the bank covering the amount of the check. The fact that he has deposited the amount of the check does not authorize him to certify his own check. A cashier has the inherent power to buy and sell foreign or inland bills of exchange. Dealing in bills of exchange is a part of the business of banking, and it becomes the duty of the cashier in the purchase and sale of the same to indorse them over to the buyer. He is charged with the care and safekeeping of all the notes, bonds, bills and other securities and valuable papers belonging to the bank, and may during the ordinary course of business sell, transfer and dispose of the same, and it will be presumed until the contrary is shown that he sold the same on behalf of the bank and was authorized to do so by the directors, or that they ratified his acts. When a run occurs upon a bank the powers of the cashier in relation to the property of the bank are not changed or in any way affected. In such a crisis the cashier has the power to put into exercise every usage, custom and law in order to protect the interests of the bank and see that no depositor or creditor obtains a preferred position or right over another creditor equally entitled. A cashier may draw checks while away from the bank, and may also indorse papers while away from the bank. He may likewise pay or certify checks away from the bank. A cashier has no right by virtue of his office to compromise a claim of the bank or to execute a composition agreement and release therefor.

Paying and Receiving Tellers.

The functions of the tellers of a bank, both receiving and paying, are respectively to receive and pay out the moneys of the bank, and as a rule one cannot discharge the duties of the other. The paying teller is entrusted with the custody and disbursement of the funds of the bank. He must know the signatures of the bank's customers and be ready to decide upon the payment or refusal of all checks when presented. The teller has no authority to make contracts for the bank, and when he attempts to do so, if the party dealing with him has knowledge of the fact that his

position in the bank is that of a teller, the bank is not bound by the contract where the same is outside of his duty and authority. It is the duty of the paying teller when authorized to certify checks, unless such authority is strictly delegated to the cashier. A paying teller cannot be held liable for paying a raised check which by ordinary care, careful scrutiny and inspection, could not be discovered. It is the duty of the paying teller, after the exchanges have been made at the clearing house, to examine carefully each check coming through the same before charging the same to the drawer's account. The paying teller should, before honoring a check, satisfy himself that there is no revocation not to pay previously entered with the bank by the maker. At the close of the day's business it is the duty of the teller to make proof of the day's transactions; his cash on hand, adding all checks paid, must agree with the cash received from the cashier at the beginning of business of that day.

It is the duty of the receiving teller of a bank not to receive or give credit to a depositor for money, checks or drafts which may be counterfeits or spurious. He is required to make a careful examination of each coin, banknote, check, draft or other instrument offered for deposit, and before acceptance, if in doubt as to their genuineness, apply the tests known to experts.

It is the duty of the note teller of a bank to receive the money for all promissory notes liquidated at the bank. At the close of each day's business the teller must account for the disposition of all notes received by him. All notes received by him which are payable at other places in the city are sent out by messenger for presentation and collection. When notes are paid certified checks or money should be demanded.

Savings Banks.

In order to stimulate the habit of saving among the poor savings banks were organized. Originally these were mutual in principle and charitable in character. Savings banks are not formed primarily for the advantage and profit of the stockholders or corporators, but for the benefit of the depositors, and in this respect they differ radically from ordinary banks. Strictly speaking, they cannot be called charitable institutions. The chief business of a savings bank is to receive deposits, invest them in certain classes of securities and pay to depositors the amount due them as they from time to time demand. A savings bank has no authority to do a general banking business, not even to engage

in the business of discounting bank paper. It is no part of the business for which it is established to obtain a market value for or give a market value to the negotiable paper of persons or other corporations by guaranteeing or indorsing it. Its duty is to keep the moneys deposited with it safely invested, and not to hazard those moneys by assuming responsibility for the performance of the contracts of others. The investments which such institutions may make are prescribed by their charters or by general statute, and must, of course, be made in accordance therewith. There are also statutes in the various States regulating savings banks in regard to the reserve fund, the division of profits and other like matters.

Savings banks are of two classes—mutual associations and capital stock corporations. A mutual savings bank is organized without capital stock and for the sole purpose of accumulating, holding and loaning the funds of their members. They are institutions for the deposit and safekeeping of money, and the profits, if any, arising from the investment of such deposits, are annually or semi-annually paid to the depositors.

Where a statute authorizes the incorporation of such a savings bank, the law will not permit the bank to conduct any other than a savings bank business. When savings institutions are incorporated without capital stock they are merely places of deposit where money can be left to remain or to be taken out at the pleasure of the owner, and under such terms as may be stipulated in the by-laws and agreed upon between the parties. In such a case the assets consist in loans of money made by them for the benefit of the members or depositors from whom the money was derived. In case of loss, they have no property out of which it can be paid, and the loss is apportioned *pro rata* among the depositors.

A mutual savings bank upon receiving money may invest the same, but the securities taken are for the general benefit of all the depositors. After the necessary expenses are paid for its management, the interest received upon the investments must be ratably divided among the depositors. The trustees and officers, in the absence of fraud, have no personal liability.

Capital Stock Corporations.

Where a savings bank is incorporated with capital stock, the stock of the corporation becomes a security to the depositor in case of loss. The trustees or directors in a corporation organized with capital stock are also held bound by the same in relation to

the funds entrusted to them as are the trustees in a mutual association.

The authorities are not agreed as to the precise legal relation existing between a savings bank and its depositors. By some the relation is held to be that of agent and principal; by others that of debtor and creditor. The view supported by the weight of authority is that the bank is a trustee for depositors. The doctrine established by the leading authorities is to the following effect: The rights of the depositors in a savings bank are of a twofold character. While the corporation is solvent and in operation, the depositors may be regarded solely in the light of creditors of the corporation; they may withdraw their deposits and claim interest, as provided in the charter and by-laws, and may enforce their rights by the usual remedies at law. But the depositors are in reality something different from ordinary creditors. They are joint beneficiaries of the corporate estate and occupy a position similar to that of stockholders in an ordinary corporation. The Courts will recognize the true position of the depositors as they do the true position of the shareholders, whenever this becomes necessary for the protection and adjustment of their equitable rights.

A depositor in a mutual savings society is declared as holding the same relationship as stockholders in a capitalized bank, and may be held liable for his or her proportion of the losses if any exist at the time of winding up the affairs of the bank. A depositor in a capitalized savings bank has no liability at any time.

A savings bank may make such rules and regulations for the receiving and withdrawing of deposits as are reasonable, and such rules constitute the contract between the bank and the depositor and are binding on both. Generally these rules are printed in the pass book given the depositor when the account is opened.

Savings banks generally require depositors to give notice of an intention to withdraw a deposit. This right may be waived by the bank. A rule that payments made to the person producing the pass book shall discharge the bank is usually adopted by institutions of the kind under discussion, and such a rule has been held by the Courts to be reasonable, and discharges the bank when it has exercised care in paying, even though the presenter was a thief.

If a depositor loses his pass book he must furnish satisfactory proof of loss as well as indemnity before he can draw out any funds.

Officers, Duties and Liabilities.

The officers entrusted with the management of the affairs of a savings bank are held to the exercise of common care, prudence and judgment. They cannot assume responsibilities nor enter into contracts or transactions so as to bind the bank, unless such acts are clearly incidental to the duties imposed upon them.

The chief managing officer of a savings bank is the treasurer, and when thus acting he has authority to collect the bank's debts, and to that end can conduct the bank's litigation; to extend the time for paying a debt; to take possession of land acquired under a mortgage; or to receive special deposits. He is specially authorized to sell and transfer stocks and mortgages, and his authority to indorse notes may be inferred from the conduct of the trustees without any express direction from them.

The general rule applying to the trustees and directors of savings banks is the same rule that applies to the directors of other banking institutions. If they invest their bank's funds on personal security, or in any other manner contrary to law, they render themselves liable.

The treasurer of a savings bank is an officer of much more limited powers than the cashier of a commercial bank. His duties more nearly resemble those of the paying and receiving tellers of banks.

A delivery of a savings bank deposit book by the depositor to a third person, with intent to make a gift of the deposit, constitutes a valid gift. If, however, the book is delivered merely for safekeeping, or for a purpose inconsistent with an intention to relinquish the control of the deposit or the depositor's interest in it, there is no gift.

Upon the insolvency of a savings bank, the assets become a trust fund to be managed for the benefit of the creditors. A general depositor cannot set off his deposit against a debt due from him to the bank; all he is entitled to is his just proportion of what remains at the final winding up of the institution.

Clearing House.

In connection with the subject of banks and banking, a definite knowledge of the functions of a clearing house is most important. A clearing house is a voluntary association of banks for the purpose of making exchange of notes, checks, bills and moneys and settlements between the banks, all of which must belong to the association. A clearing house is not a bank used

for the purpose of receiving moneys or other securities on deposit. Neither does it do a discount business. It may be an incorporated body, composed of banks where such banks may become stockholders, but is usually an association of bankers for the purpose of making exchanges.

A clearing house, although occasionally issuing certificates, which circulate to a limited extent and chiefly in discharging balances due from one bank to another, is not a bank. A clearing house due-bill is not a mere certificate of deposit, but is negotiable, like a check payable to bearer. The Supreme Court of Pennsylvania has decided that a national bank does not violate its charter in joining a clearing house and assisting in its management, even to the extent of participating in the issue of certificates issued by it. As they are issued on the deposit of securities, they possess a real value, and the rightful possessor of them is, therefore, an owner for value.

As matter of general information it may be stated that the idea of a clearing house originated in the city of Edinburgh, Scotland, but the earliest record of one is that of London, founded about 1775. To-day clearing house associations exist in every large city in the country. The Clearing House Association of New York consists of the principal incorporated banks. Two clerks from each bank attend at the Clearing House every morning, where one takes a position inside of a counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand parcels containing the checks on each of the other banks, received the previous day. At the sound of a bell, the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents, until, having walked around, they find themselves at their own desks again. At the end of this process the representative of each bank has handed to the representative of every other bank the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he is to pay into or receive from the Clearing House a balance in money. Balances are settled daily.

Rules and regulations made by a Clearing House Association must be reasonable and not in violation of any law, and, generally speaking, are practically the same throughout the country. Banks may make rules for securing the payment of balances that may be found due from one member to another; but the rules and usages of a clearing house are for the benefit of its members, and their customers can neither claim the benefit of nor be injured by them.

Members are permitted to clear for other banks or trust companies in the same city or vicinity, by complying with rules that are established for the protection of clearing house members. Such a contract between the two banks does not impose the same liability on the clearing house bank to pay the checks drawn on the other as the law imposes on the drawee bank itself. It has been held that the non-member is bound by the refunding of a check by the other, even though this be done later than the time fixed by the clearing house.

A settlement made by two banks through the clearing house, in which checks are presented and exchanged and the balance between them is struck, will be final if either fails to give notice of maturity to meet the balance against it on the general adjustment before the hour when banks usually pass credit to the checks of their depositor. If by any mistake of fact a check so paid but not good was retained until after the hour fixed, the payment is held to be treated as payment made under a mistake of fact to the same extent and subject to the same right of reclamation as if it had been made without the intervention of the clearing house.

The Courts of Pennsylvania have decided that a rule of the Philadelphia Clearing House that, on the discovery that checks received in the morning exchanges are not good or are informal, they must be returned by noon of the same day, does not apply to forged checks, and furthermore, that another rule, to the effect that errors shall be adjusted before a fixed time, does not apply to an overdrawn account.

Another useful function of a clearing house is to give aid to its members in times of financial stringency by issuing clearing house certificates to meet the emergency. The value of this method was clearly demonstrated in the recent panic (1907). These certificates extend the term of mutual credit involved in all clearing house settlements. They are not used as currency, but their effect is to add their face value to the volume of currency in circulation by releasing for use outside that which would otherwise have been reserved for clearing house settlements.

APPLICATION FOR TRADE-MARKS

Statement by an Individual

To all whom it may concern: *Be it known that I, _____, a citizen of the United States, residing at _____, in the state of _____, and doing business at No. _____ on _____ street, in said city, have adopted for my use a trade-mark for whiskey, of which the following is a full, clear, and exact specification:*

My trade-mark consists of the word-symbol "Moonshine." This has generally been arranged as shown in the accompanying facsimile, which represents a rude still-house, surrounded by hills and forests. Three men are engaged variously about, and the scene is illuminated partly by the light of the fire, partly by the moon which appears in the heavens. Underneath the picture appears the word "Moonshine" in ornamental letters; but the style of lettering is unimportant, and the entire picture may be omitted or changed at pleasure without materially affecting the character of my trade-mark, the essential feature of which is the arbitrary word "Moonshine."

This trade-mark I have used continuously in my business since the _____ day of _____, 19____. The class of merchandise to which this trade-mark is appropriated is distilled liquors, and the particular description of goods comprised in said class upon which I use it is whiskey. It is my practice to apply my trade-mark to the bottles containing the liquor by means of suitable labels, on which it is printed in color as above described. The word is sometimes also blown into the bottles.

(Two witnesses.)

Statement by a Firm

To all whom it may concern: *Be it known that we, _____ & Co., a firm domiciled in _____, county, state of _____, and doing business at No. _____ street, in said city, have adopted for our use a trade-mark for men's overalls, of which the following is a full, clear, and exact specification:*

Our trade-mark consists of the arbitrary word _____. This has generally been arranged as shown in the accompanying facsimile, in which it appears in plain block capitals, printed in black, in a horizontal line. But other forms of type may be employed, or it may be differently arranged or colored, without materially altering the character of our trade-mark, the essential feature of which is the word _____.

This trade-mark has been used continuously in business by us, and those from whom we derive our title, since the _____ day of _____, 19____.

The class of merchandise to which this trade-mark is appropriated is wearing apparel, and the particular description of goods comprised in such class on which it is used by us is men's overalls. It has been

our practice to mark our trade-mark on the inside of the waistband of the goods with a stencil, or to print it upon tags which are secured to the goods in any desired manner.

Statement by a Corporation.

To all whom it may concern: Be it known that the Company, a corporation organized under the laws of the state of _____, and located in the city of _____ county, in said state, and doing business in said city of _____ and also at _____, in the state of _____, has adopted for its use a trade-mark for wheat flour, of which the following is a full, clear, and exact specification:

The trade-mark of said company consists of a representation of a Rocky Mountain sheep and the words "Big Horn." These have generally been arranged as shown in the accompanying facsimile, in which the animal named, popularly known as the "Big Horn," is represented in an erect attitude upon a cliff or rock. In the background are mountains covered with forests, with distant white peaks; upon the sky portion are the words "Big Horn," and arranged in a circle about the whole are the words _____ Company, in plain capital letters. But these words may be omitted, and the various accessories of the picture may be varied at pleasure, or altogether omitted, without materially altering the character of the said trade-mark, the essential features of which are the words "Big Horn," and the representation of a Rocky Mountain sheep.

This trade-mark has been continuously used by said corporation since about the middle of the month of _____, 19__.

The class of merchandise to which this trade-mark is appropriated is flour, and the particular description of goods comprised in such class on which it is used by the said company is wheat flour. It is usually affixed to the goods by printing it on the bags, or stenciling it on the heads of barrels in which the flour is packed

Declaration

State of _____, county of _____, ss: A. B., being duly sworn, deposes and says that he is the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that he has at this time a right to the use of the trade-mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by him in commerce between the United States and foreign nations or Indian tribes, and particularly with _____; and that the description and facsimile presented for record truly represent the trade-mark sought to be registered.

Sworn and subscribed before me, a _____, this _____ day of _____, 19__.

TRADE-MARKS.

Defined—Registration—Test of Validity—Assignments—Abandonment.

A TRADE-MARK has been judicially defined as “the name, symbol, figure, letter, form or device adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise.” A trade-mark in reality is a notice indicating the origin and ownership of the goods to which it is applied, and cannot exist apart from a business or the good-will of a business.

Trade-marks are of the most ancient origin. When Daniel was delivered into the den of lions, we read in the Sixth Chapter of the Book of Daniel, verse 17: “A stone was brought and laid upon the mouth of the den, and the King sealed it with his own signet and the signet of his lords”; and in the earliest history of commerce frequent references are made to the subject of trade-marks. In view of their general adoption it is well to inquire briefly into the law regulating their application.

The right to the use of a trade-mark is one which acknowledges no territorial boundaries and is not limited in time; it is such a right as must exist exclusively in the proprietor, either individually or jointly with others, and may be regarded as one's commercial signature. To prevent the public from being deceived into purchasing the goods and manufactures of one person, supposing them to be those of another, the law gives to the original appropriator of a distinctive trade-mark the exclusive privilege of using it, and a Court will restrain another from using it or award damages to the owner for such unlawful use thereof.

The object of using a trade-mark is to bring seller and buyer together, that the one may sell his merchandise and the other obtain the particular goods the reputation of which has won his confidence; it guarantees to the purchaser the genuineness of the article bought. The object of the law is to secure to him who has been instrumental in bringing into the market a

superior article of merchandise the fruit of his industry and skill, and to protect the community from imposition, thus preventing fraud upon the manufacturer and deception upon the public. The adoption of a trade-mark to indicate the manufacture of a certain article does not give any right to the exclusive production of the article so marked, as any article of manufacture, unless it be protected by a patent, may be sold by any person, it being the right of any person possessing sufficient skill to copy or imitate any unpatented article. No one, however, can use a trade-mark to pretend that the goods offered by him are the products of another. The theory upon which the law of trade-marks is based is the promotion of honesty and fair dealing. A trade-mark does not partake of the character or nature of a patent or copyright, as there is no property right to a trade-mark apart from the goods to which it is applied. Consequently the right to a trade-mark is one which can be tested only by its violation. So long as no one imitates the trade-mark the proprietor has no means of testing its validity.

It is necessary to distinguish between trade-marks and trade-names. A manufacturer may have no trade-mark, and yet may be entitled to restrain another from imitating the form, color or general appearance of his labels, packages or articles, from in any way dressing up goods so as to cause them to be mistaken for his, or from resorting to any trick or artifice whereby another's goods are palmed off on the public as his. Such actions involve what is known as unfair competition in trade, which subject will be discussed hereinafter, and should not be confused with trade-marks.

There are three characteristics of a technical trade-mark: First, it must point distinctively, either by its own meaning or by association, to the origin or ownership of the article to which it is affixed; second, it must be affixed or applied to a commercial article; and, third, it must be of such nature that it can be rightfully appropriated by one person to the exclusion of all others.

What may be Appropriated as a Trade-Mark.

A trade-mark is not limited to a device or name, but may consist of any marks, forms or symbols which serve to designate the true origin or ownership of the article. Fancy names, whether invented or arbitrary; the names of places, words where applied to a new process by the inventor, the name of an article

which alone designates its origin or ownership, letters and numerals combined in unusual and peculiar forms, or with other parts composing trade-marks, have been held under the particular circumstances of the various cases to be valid trade-marks. A man, of course, may adopt for a trade-mark whatever he chooses, but when he asserts and seeks to enforce exclusive rights therein it becomes necessary to ascertain whether it is just to others that this be permitted. If the name, device or description is purely arbitrary or fanciful, and has been first brought into use by him, his right to the exclusive use of it is unquestionable. No exact statement of what a trade-mark may consist can be made. The true test is, was the mark adopted or has it come by use to indicate primarily the origin or ownership of the article to which it is applied? Can others, with equal truth, use it for the same or a like article?

A proprietor of a trade-mark may manufacture and sell several different grades or qualities of the same general line of goods, and may adopt a separate mark for each quality or grade. If the primary function of each mark is to denote origin or ownership of the article with the proprietor, each mark will be a valid trade-mark.

Trade-marks may be divided into those which are personal and those which are impersonal. A personal trade-mark is one which will indicate to the public that some particular person has given his personal skill to the production of the article to which it is applied. An impersonal trade-mark is one which does not indicate that a certain article is the product of the skill of the owner of the trade-mark, but which points to him as the owner or proprietor of the manufactory or business in which such articles are produced. Impersonal trade-marks may be strictly local or perhaps become so by usage, and indicate origin at a certain place of production, without reference to the owner of the mark. Such a trade-mark passes with a transfer of the manufactory. Examples of this class of trade-marks are found in the names "Congress Water" and "Bethesda Water" and "Old Oscar Pepper Distillery," applied to the whisky produced at a certain place.

It is a well-established rule that a trade-mark must not be deceptive. Common words, when employed as trade-marks, must not give a false impression as to the qualities, ingredients or characteristics of the article. The word "Home" for sewing machines, "Star" and a symbol of a star for shirts, "Royal" for baking powder, "Yankee" for soap, and "Old Crow" for whisky,

are examples of common words which have been held to constitute valid trade-marks. The trade-mark must not be deceptive, but arbitrary or fanciful.

Personal Names as Trade-Marks.

Considerable doubt has existed among the authorities as to whether or not a personal name may be used as a trade-mark. A personal name does not respond to the tests for a technical trade-mark, for the reason that no one can have the exclusive right to such a name against another person having the same name and using it in good faith. There is, however, no reason against appropriating a trade-mark consisting of a personal name used in some peculiar or distinctive design or form. It has been held in Pennsylvania that when a commercial name, not the subject of appropriation as a trade-mark, is combined with other distinctive features, including the manufacturer's name, the whole may be adopted by him as a trade-mark, and he will be entitled to protection against such a fraudulent imitation of his wrappers and labels, bearing such trade-mark, as will enable others to deceive the public and injure his business. Hence, when the plaintiff, in the case in mind, adopted a trade-mark consisting as a whole of printed copies of the medals awarded him by the United States Centennial Commission, with words "Dreydoppel's Borax Soap" printed underneath, and used it upon his wrappers and labels he is entitled to the exclusive use of such trade-mark, and to protection against infringement of it.

Every one has the absolute right to use his own name honestly in his own business for the purpose of advertising it, even though he may thereby incidentally interfere with and injure the business of another having the same name. Where, however, two persons have the same name and use it to distinguish an article or commodity produced by them of like character, and it is clearly shown that the later user does so for the purpose of imposing his own article upon purchasers for the prior user's article, which has become well established, it is, on the part of the later user, an imposition upon the public and an attempt to secure to himself what rightfully belongs to another. To illustrate: Every one is familiar with the widespread reputation of the De Long Hook and Eye. Suppose a rival concern employs a man by the name of De Long and makes him its president or general manager and thenceforth advertises the De Long Hook and Eye, justifying such action by the statement that its president

is named De Long and has a right to the use of his own name. Under such circumstances the Court would restrain the second De Long from imposing his own article upon the public as the original De Long hook and eye. Another well-known trade-mark involving a personal name is that of "Roger Brothers" as applied to the silverware made by the well-known New England firm.

A newly-coined word constitutes one of the strongest trade-marks, the reason for which is obvious. Such a word is usually meaningless and hence can be either descriptive or deceptive. To entitle the originator thereof to hold such a word as a valid trade-mark, it is only necessary to show that it has been used or applied to commercial articles for the purpose of indicating the ownership or origin of the same. Illustrations of such trade-marks are found in the words "Sapolio" as applied to a cleaning compound; "Cottolene" as applied to the well-known substitute for lard; "Cuticura" as applied to a medicinal preparation; "No-To-Bac" as applied to a medicine to cure the tobacco habit, and countless other words.

Certain phrases, of an original nature, may also be used as valid trade-marks, as, for example, the phrase "Coal Oil Johnny's Petroleum Soap," "Lone Jack" to indicate a brand of tobacco and "La Favorita" a brand of flour. Numerals have also been held to constitute valid trade-marks. In a certain case the manufacturer of steel pens had for many years manufactured a peculiar pattern on which were the figures "303" and the words "Extra Fine." These pens were put up in paper boxes labeled with the same numerals and words. Another manufacturer began to make and sell a steel pen very much the same as the original manufacturer, on which were stamped "303" and "Esterbrook & Co., Extra Fine." The latter was sued and the Supreme Court held that he had no right to use numerals and words which had been previously appropriated by another to the same class of goods.

A picture which is neither descriptive nor deceptive may be used as a trade-mark, either alone or with other devices. The Supreme Court of Pennsylvania has held that a representation of a cornucopia printed upon cakes of butter constituted a valid trade-mark. It may be laid down as a general rule of trade-mark law that a merely geographical term cannot be used as a trade-mark. A geographical term may acquire a secondary meaning in the trade from having been long used as a designation of a particular manufactured article and thus to have lost, so far as such article is concerned, its geographical significance. For ex-

ample, the name "Waltham" on watches was originally used as a geographical term, but through continued use it gradually acquired a secondary meaning as a designation of watches of a particular class, and the public came to recognize that watches stamped with the name "Waltham" were made by the American Waltham Watch Company. Under the circumstances of this case, the name "Waltham," although geographical, was held to be a valid trade-mark.

Registration of Trade-Marks.

A common law trade-mark may be acquired by any person, firm or corporation. To protect the owner in the use of a trade-mark, it should be registered. Space will not permit a detailed discussion of what may and what may not be registered as a trade-mark, but as registration of all marks is provided for by acts of Congress of February 20, 1905, and May 4, 1906, it is well to refer to these Acts for the law at present in force in this regard.

It is provided by Congress that no trade-mark will be registered to an owner domiciled in the United States, unless it is made to appear that the same is used as such by said owner in commerce among the several States, or between the United States and some foreign nation or Indian Tribe. Any owner of a trade-mark who shall have a manufacturing establishment within the territory of the United States shall be accorded, so far as the registration and protection of trade-marks used on products of such establishment are concerned, the rights of owners of trade-marks domiciled within the territory of the United States.

No trade-mark will be registered which consists of or comprises immoral or scandalous matter, or which consists of the flag or coat of arms, or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation, or which is identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same general character, or which so nearly resembles a registered or known trade-mark owned and in use by another, as to cause confusion or mistake in the mind of the public and thus deceive purchasers. No trade-mark will be registered which merely consists in the name of an individual, firm, corporation or association, not written, printed, impressed or woven in some particular or distinctive manner or in association with the portrait of the individual; no portrait of a

living individual will be registered as a trade-mark, except by the consent of such individual, evidenced by some instrument in writing. It is furthermore provided by law that no trade-mark will be registered which is used in unlawful business, or upon any article injurious in itself or which has been used with the design of deceiving the public in the purchase of merchandise, or which has been abandoned.

Application for Registration.

To register a trade-mark, the rules of practice of the Patent Office require that an application must be made to the Commissioner of Patents and must be signed by the applicant. Such an application comprises a petition, requesting registration; a statement setting forth the name, address and citizenship of the owner of the mark; the class of merchandise, and the particular description of goods comprised in such class, to which the trade-mark is attached; a description of the trade-mark itself is only required when needed to express colors not shown in the drawing. The statement must also set forth the mode in which the trade-mark is affixed to the goods, and the length of time during which the same has been used. If the applicant is a corporation it must be stated under the laws of what State its charter was granted. Besides the petition and statement, a declaration must be filed as part of the application which is in the nature of an oath verifying the truth of the facts contained in the statement. A drawing of the trade-mark must also be furnished to the Patent Office, which drawing shall be a fac-simile of the mark as used upon the goods. Furthermore, five specimens of the trade-mark must be forwarded with the application. The charge of registering a mark is ten dollars, which must be paid upon filing the application.

Duties of Registrants.

A complete application for the registration of a trade-mark is considered in the first instance, by the examiner in charge of trade-marks. Whenever on examination of an application, registration is refused for any reason whatever, the applicant will be notified thereof. The reasons for such refusal will be stated, and such information and references will be given as may be useful in aiding the applicant to judge of the propriety of further prosecuting his application.

If on examination of an application for the registration of a

trade-mark it shall appear that the applicant is entitled to have his trade-mark registered under the provisions of the law, the mark will be published in the official gazette (a Patent Office publication) at least once, which publication shall be at least thirty days prior to the date of registration. The Act of Congress of February 20, 1905, provides that if no notice of opposition be filed within thirty days after such publication, the applicant or his attorney will be duly notified of the allowance of his application, and a certificate of registration will be issued.

It is provided by the Rules of Practice of the Patent Office that whenever application is made for the registration of a trade-mark which is substantially identical with a trade-mark appropriated to the goods of the same descriptive properties, for which a certificate of registration has been previously issued to another or for the registration of which another had previously made application, or which so nearly resembles such trade-mark or a known trade-mark owned and used by another, and is in the opinion of the Commissioner likely to be mistaken therefor by the public, an interference will be declared.

Any person who believes he will be damaged by the registration of a trade-mark may oppose the same by filing in duplicate a written notice of opposition, setting forth the grounds of objection. Such notice of opposition is required to be filed within thirty days after the publication of the trade-mark. If any person considers himself to be injured by the registration of a trade-mark in the Patent Office, he may at any time make application to the Commissioner of Patents to cancel the registration thereof. Such application must be filed in duplicate and set forth fully the grounds upon which cancellation is asked.

After the requirements of the law have been complied with, and the Patent Office has held a trade-mark to be registrable, a certificate will be issued, signed by the Commissioner of Patents, under the seal of the Patent Office, to the effect that the applicant has complied with the law and that he is entitled to the registration of his trade-mark. A certificate of registration of a trade-mark shall remain in force for the period of twenty years from its date, except that in case a trade-mark has been previously registered in a foreign country, such certificate shall cease to be in force on the day on which the trade-mark ceases to be protected in such foreign country, and shall, under no circumstances, remain in force more than twenty years unless renewed.

The law provides that a certificate of registration may be

renewed from time to time for like periods. Application for renewal may be made at any time not more than six months prior to the expiration of the period for which the certificate of registration was issued or renewed.

Assignments.

Any registered trade-mark and every trade-mark, for the registration of which application has been made, is assignable in connection with the good-will of the business in which the trade-mark is used. Such assignment must be made in writing and should be recorded in the Patent Office. No assignment will be recorded unless in the English language and unless an application for the registration of the trade-mark shall have been first filed in the Patent Office. The assignment must identify the application by a serial number and filing date, or when the trade-mark has been registered, by the certificate number and date of issue. An assignment of a trade-mark is void by law, as against any subsequent purchaser without notice, unless it has been recorded in the Patent Office within three months from the date of its issue. The certificate of registration may be issued to the assignee of the applicant, but it is necessary that the assignment must be first entered of record in the Patent Office. The official gazette of the Patent Office contains a list of all trade-marks registered, giving in each case a statement of address of the applicant, the date of filing and serial number of application, and the date of publication of the trade-mark in the official gazette. The United States Statutes concerning the registration of trade-marks with the rules of the Patent Office relating thereto may be obtained upon request to the Commissioner of Patents.

The duty is imposed by law upon every registrant to give notice to the public that the trade-mark is registered, either by affixing thereon the words, "Registered in the United States Patent Office," or "Reg. U. S. Pat. Off.," or when from the character and size of the trade-mark, or from its manner of attachment to the article to which it is appropriated this cannot be done, then by affixing a label containing a like notice to the package or receptacle wherein the article or articles are inclosed; otherwise if suit for infringement of the trade-mark is brought, no damages can be recovered except on proof that the defendant was duly notified of infringement and continued the same after such notice.

As a protection to domestic manufacturers and traders, Con-

gress has provided by law that no article of imported merchandise shall be admitted to entry at any custom house of the United States which shall copy or simulate the name of any domestic manufacturer or trader, or of any manufacturer or trader located in any foreign country which by treaty affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the laws of this country. It is further provided that no imported goods shall be admitted into the custom houses of the United States which shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States.

Abandonment.

A trade-mark, whether it consists of symbol or name, may be abandoned, and if it is it may then be appropriated by any one, who by so doing adopts it as his own, or after it is abandoned, it may be resumed by the original proprietor, and re-adopted by him. It has been held that the consent of a manufacturer to the use or imitation of his trade-mark by another may be inferred from his knowledge and silence. A complete disuse of a trade-mark amounts to an abandonment thereof, and thereafter the same may be appropriated by others.

The transfer of the property and effects of a business carries with it the exclusive rights to use such trade-marks or trade names as have been used in such business, these incidents being attached to the business or right of manufacture and pass with it, for, as has been pointed out previously, a trade-mark has no separate existence, there being no property in words, as detached from the thing to which they are applied. Therefore, a conveyance of the thing to which a name or trade-mark is attached carries the same with it.

It is possible for a person to assign lawfully and sell, not only a trade-mark indicative of origin in himself, but even the right to use his own name in connection with a particular business, and the assignee will thereby become entitled to the exclusive use of the name, even as against the assignor. Of course, a person is entitled to use his own name in conducting a business or in connection with others, if done in a proper and legitimate way, and this is a very valuable right especially when he is the discoverer of a valuable article of trade then being manufactured and sold in the market. But this right, the same as other property rights, is subject of sale or transfer and any person who has car-

ried on business under a trade name, or who has made and sold a particular article in such a manner as by the use of his name to cause the business to become known and established in favor under such name, can sell or assign the same when he sells his business and thereby deprive himself of the further use of his own name. Upon the principle, when a partnership is formed to manufacture the article to which a trade-mark is properly applied, the trade-mark of one partner becomes part of the partnership property. If a partnership is doing business in two cities, and expires by limitation of time, and one of the partners continues to conduct the business at the old location in one city, he would acquire the right to do so, and the same right would also exist in favor of the other partner conducting the same business in the other city.

Where a trade-mark consisting of the name of an individual was used to denote an article made by a firm of which he has been a member the Court held that such a name was not guaranty that the goods were made by the individual personally; that the use of the name by an assignee was not a fraud upon the public and consequently the sale of the right was valid.

It is well to remember in connection with the sale or assignment of trade-marks that a trade-mark cannot be levied upon and sold under execution as a species of tangible property unless a local statute confers such right. A statute is not to be construed, however, as authorizing any one to purchase a trade-mark and affix it on his own product where such a construction would permit of a fraud or deception upon the public.

We have heretofore referred to unfair competition in trade, and as there are few questions of more importance to the business man, we will inquire briefly into the elements constituting such unlawful competition.

The law of unfair competition in trade is of comparatively recent development, but a set of rules has now been adopted by our Courts by which persons who have no technical trade-marks are protected in the use of personal and descriptive name-marks, labels, forms of packages and wrappers or other insignia which have become associated with their business or products. Competition is the life of trade, but it is the policy of the law to foster honest competition, and no Court will countenance fraud or dishonesty under the guise of business competition. Concisely stated, the law will prevent rival manufacturers from beguiling the public, by means of imitative devices, into buying their products under the false impression that they are purchasing a

rival's goods. In this connection it is important to distinguish between the infringement of a trade-mark and unfair competition. The former consists in the unlawful use by one of the trade-mark of another, whereas unfair competition is the simulation by one of the packages and products of another for the purpose of deceiving the public. Two rivals in business may have an equal right to use the same words, marks or symbols on similar articles manufactured by both, but if such words, marks or symbols were used by one before the other, the latter may be restrained by legal process from using the same marks on similar goods.

The right to use a corporate name is also involved in the subject under discussion. Ordinarily such right is protected by positive statute, and may also be protected as a trade-name. If not, it will be protected under the general principles which govern unfair competition. Thus, the outgoing stockholders of a corporation, the most distinguishing part of whose names the corporation bears, have no right to compete in business under a corporate name so nearly like the first as to mislead customers. A corporation is, therefore, compelled to adopt a name sufficiently distinctive as to avoid becoming confused with the corporate name of a competitor. Many products, particularly compounds, medicines, etc., are manufactured under secret, but not patented processes. It can readily be seen that unless the law prevented, an employee could learn the secrets of his employer and set up an establishment of his own, and appropriate valuable processes for his own profit. The manufacturer of such articles or products, to prevent such a contingency, generally requires his employees to agree not to disclose or use the trade secrets imparted to them. The law, whose policy it is to establish and maintain a high standard of business morality, will enforce such an agreement and hold liable any employee who is guilty of a breach thereof.

If a member of a partnership obtains information of a secret nature while transacting partnership business he will be liable to account to the firm for any profit he may obtain from the use of such information. Frequently an employee who severs his connection with his employer to engage in business for himself advertises the fact of his former employment. The mere advertisement of the "late with" any well-known firm, even when done for the purpose of drawing a part of the custom of the old firm, is not in itself unfair competition.

A merchant has no right to apply the name of a well-known article or commodity to goods of inferior quality. Every one has doubtless heard of Dr. Jaeger's sanitary woolen underwear.

Dr. Jaeger was a scientist who gave to the world a system of all-wool underwear. He was a philanthropist, not a manufacturer or dealer. Under an agreement with the scientist, a firm made and sold such underwear in strict accordance with the system. A competitor adopted Dr. Jaeger's name to designate the kind and quality of his goods, but sold as the same kind of underwear an inferior article containing more or less cotton. It was held by the Court that such use of Dr. Jaeger's name was a deceptive misrepresentation and constituted unfair competition.

A Court will order an injunction to prevent unfair competition consisting of the use of signs or tokens which serve to confuse the identity of one man's business with that of another. A manufacturer's distinctive advertisements cannot be imitated by devices which involve nothing original, and, although not identical in every regard, are so similar as to be readily mistaken for the original by the ordinary purchaser.

There is no especial right to the use of a family name which has become a trade-mark applied to a manufactured article by reason of the relation which the descendants bear to the original manufacturer of the same name. In a quite recent case the defendants were the selling agents of the "Remington-Sholes" typewriters, which were manufactured by the descendants of the original Remingtons. The descendants of the original manufacturers became members of a corporation which made a typewriter under the name of "Sholes," which was then changed to the "Remington-Sholes." As a purchaser of the typewriter might be led to think that the addition of the name "Sholes" was a new style of the old machine coming from the same source, the use of the name "Remington" was held to be an attempt to deceive the public and was therefore unlawful.

A manufacturer may indicate his goods by a particular label or wrapper, and he will be protected in its use. Such labels are used for the purpose of distinguishing the goods to which they are attached from those manufactured by other parties, and when another person uses the same label or a colorable imitation thereof the result is the same as in the case of the imitation of a trade-mark. A Court of Equity will restrain the person from selling labels to parties who use them in unfair competition with the business of another; a person may acquire an exclusive right to use a package of a fixed shape, style and dimensions, with emblems, labels or other devices thereon. Thus in a well-known case, where the general appearance of the bottles and labels used in marketing a preparation known as "Castoria" was so nearly

like that used by another party for many years in the sale of his preparation under the same name, as to deceive the ordinary purchaser, it was held that the right to an injunction was not defeated because changes had been made in the shape and color of the bottle and in the tint of the label, where the changes were so slight as not to attract general attention. .

In conclusion, it may be stated, in the language of a noted jurist, that the theory upon which the law regulating business competition is founded, is to protect the user of a name, mark, label or other device which is of value to him, from attack by "the piratical craft which infest the seas of modern business."

ASSIGNMENT OF COPYRIGHT

This Indenture, Made the _____ day of _____, 19____, between _____ of _____, hereinafter called the vendor, of the one part, and _____ of _____, hereinafter called the purchaser, of the other part: Whereas the said vendor is the author and absolute proprietor of the copyright of a book or work entitled, etc.; and has agreed with the said purchaser for the absolute sale to him of the said copyright free from incumbrances, at the price of _____ dollars; Now this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the sum of _____ dollars by the said purchaser to the said vendor now paid, the receipt whereof is hereby acknowledged, the said vendor hereby assigns, and as absolute owner conveys unto the said purchaser, his executors, administrators, and assigns, the unincumbered copyright of and sole privilege of printing all that the said book or work entitled, etc.; and all future impressions of the said work. To have, hold, exercise and enjoy the said copyright and premises unto the said purchaser, his executors, administrators, and assigns, henceforth during the residue of the term of the said copyright now unexpired, for his and their own use and benefit, but subject always to such right as may now be subsisting in the publisher or proprietor of the last edition of the said book or work to prevent the publication of any future edition of the same until such last edition shall be out of print.

In Witness, etc.

COPYRIGHTS.

Origin and Development—How Secured—Infringement—Publication.

NO BETTER title to property can exist than that acquired by production, on the principle that to him belongs the harvest whose toil has produced it; to him the fruit who has planted the tree. This is the natural mode of acquiring property. Ownership, therefore, is created by production, and the producer becomes the owner, which principle applies to all kinds of labor, whether of the body or of the mind. As to works of imagination and reasoning, if not of memory, the author may be said to create, and in all departments of mind new books are the product of the labor, skill and capital of the author. The subject of property is the order of words in the author's composition; not the words themselves, which may be said to be analogous to the elements of matter, which cannot be appropriated unless combined. The nature of the right of an author in his works is analogous to the rights of ownership in other personal property.

The origin of the sole rights of an author to publish his book for a limited period of years may be placed in the reign of Queen Anne of England (1710), when Parliament passed an act for the encouragement of learning, although the exclusive right reserved to an author is believed by some to exist independently of statute. Blackstone in his famous "Commentaries on the English Law" says: "The identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition, and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no man can have a right to exhibit it, especially for profit, without the author's consent."

Before publication an author has in the fruits of his intellectual labor a property as whole and as inviolable as that which exists in material possessions; he has supreme control over such productions; may exclude others from their enjoyment and dis-

pose of them as he pleases. It is undoubted that an author has such powers while his work is in manuscript. When, however, an author publishes his work, his right to exclusively control the same depends upon statute law.

The first legislation on the subject of literary property in the United States appears at the close of the Revolutionary war, when Massachusetts and Connecticut passed a law to secure to every author the profits that might arise from the sale of his works. Article I, section 8, of the Constitution of the United States empowered Congress "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." In pursuance of this power Congress has enacted certain laws regulating copyrights, which it will be our purpose briefly to consider.

The law regulating copyrights at present prevailing, is to be found in the Act of Congress, dated March 4, 1909, which went into effect on July 1, 1909.

The right to protection vests immediately upon the publication of such work as comes within the purview of the statute with notice of copyright, which shall consist either of the word "copyright," or the abbreviation "cpr.," accompanied by the name of the copyright proprietor, and the year, and such notice shall be affixed to each copy thereof published or offered for sale in the United States, by authority of the copyright proprietor. As soon as a copyright has been secured by publication of the work with the notice of copyright as above set forth, registration thereof should be made by depositing two complete copies of the best edition thereof with the Register of Copyrights in the office of the Librarian of Congress. If a book or other publication is sought to be copyrighted, notice thereof shall be placed on the title page or the page immediately following.

The works for which copyrights may be secured shall include, generally speaking, all the writings of an author. Any book, periodical, newspaper, lecture, sermon or address prepared for oral delivery, dramatic or musical compositions, maps, works of art, models or designs for works of art, photographs, prints, pictorial illustrations, and drawings or plastic works of a scientific or technical character constitute proper subject matter for copyrights.

The privileges conferred by the Act may be enjoyed for a period of twenty-eight years, and may in certain cases be

renewed for a further term of twenty-eight years provided application therefor be made within one year prior to the expiration of the term of the original copyright.

It is required that applicants for registration of copyrights shall be citizens of the United States or citizens of countries granting reciprocal copyright privileges, which shall be determined by proclamation by the President of the United States. With but few exceptions, the mechanical labor in connection with the publication of a work forming the subject matter of copyrights must be performed within the United States in order to entitle the author or proprietor thereof, to the protection of the law. Affidavit to this fact must accompany the application for registration.

The cost of obtaining registration is one dollar, which sum includes a certificate of registration.

Upon securing registration of a claim for copyright, the owner or proprietor thereof, shall have the power to print, re-print, publish, copy, and vend the copyrighted work. He is also vested with the right to translate the copyrighted work to other languages and dialects, if it be a literary work; to deliver or authorize the public delivery of the copyrighted work for profit if it be a lecture, sermon, address or similar production; and to perform same if it be a dramatic work or musical composition.

The owner or proprietor of a copyrighted work may prevent its infringement by resorting to the equitable remedy of injunction. Damages may also be recovered to compensate for the loss or injury effected by the infringement and in the event that infringement is wilful, same may be punished by fine and imprisonment.

Publication.

It is important to understand clearly what constitutes a publication as an intellectual production. To publish a thing is to make it public by any means or in any manner in which it is capable of being communicated to the public. Literary, dramatic and musical compositions may be published by being read, represented or performed, or by the circulation of printed or manuscript copies. Paintings and works of sculpture are published when they are exhibited to the public. A person has no right to report a lecture or other written discourse which its author delivers before a public audience, and which he desires again to use in like manner for his own profit, and to publish it without

his consent, or to make any use of a copy thus obtained. The student who attends a medical lecture may have a perfect right to remember as much as he can and afterward to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, without involving the right to commit the lecture to writing for the purpose of publishing it subsequently, either in print or by oral delivery. On the same principle it has been held that any one of an audience at a concert or opera may play a tune which his ear has enabled him to catch, or sing a song which he may carry away in his memory, for his own entertainment or that of others, but he would have no right to copy or publish the same.

An immoral, seditious, blasphemous or libellous work cannot be copyrighted, and consequently if the author has published a work of this kind he cannot prevent any one else from republishing it.

Unless copyright is claimed by printing a notice to that effect, a work once published becomes public property. A letter written in the course of an ordinary correspondence is the literary property of the writer, and the party receiving such a letter has no right to make its contents public. The law on this point was established as early as 1741, when the Court restrained a certain bookseller from publishing the private correspondence between Alexander Pope and Dean Swift. This doctrine is not based on considerations of policy or social ethics, but on the ground that the writer has a property interest in his own letters.

The word "book" as used in the copyright statutes has a wide significance. It need not be a volume made up of several sheets bound together. The literary property intended to be protected by the act is not determined by the size, form or shape in which it makes its appearance, but by the subject matter of the work. In fact, it has been held that a diagram with directions for cutting garments, printed on a single sheet, was a book within the meaning of the statute.

The name or title of a book, magazine or newspaper cannot be copyrighted, a title being treated as a trade-mark. Any subsequent editions of a work not differing from the first are protected by the original copyright. Compilations which comprise selecting, arranging and combining old material in a new form may be copyrighted.

An advertisement which has no other use or value than to make known the place and kind of business of the advertiser is

not within the scope of the copyright law. But information and the results of learning valuable to others than the advertiser may be contained in an advertisement. For example, a dealer may give interesting facts concerning bronzes, pottery, furniture or other articles in an advertisement. If so, he would be entitled to protect the same by copyright.

The test of what may be copyrighted is originality. In the most original works of modern genius thoughts and sentiments are found as old as language itself. Strictly speaking, nothing is original, but the object of the law is to promote learning and useful knowledge by protecting the fruits of intellectual activity. Hence the term "originality" has a very broad meaning in connection with copyrights.

Piracy.

Piracy is the use of literary property in violation of the legal rights of the owner. The true test of piracy is not whether a composition is copied in the same language or the exact words of the original, but whether its substance is reproduced.

The law encourages certain uses of a copyrighted work. A critic or reviewer may make liberal quotations from the original work, with or without acknowledgment of the source, and either for favorable or unfavorable comment.

The owner of a copyright may license another to publish his work as well as assign his interest thereunder. Joint owners of a copyright may make a contract among themselves as to printing and publishing their work, and one of them cannot set up as against another his original rights as a joint owner in violation of such contract.

How to Obtain Copyright.

The most convenient way in which to obtain exact instructions for the copyrighting of any work is to write to the Register of Copyrights, Washington, D. C., describing the character of the work to be copyrighted, and asking for the necessary blanks upon which to register it.

Under the old law, which was in effect prior to July 1, 1909, it was necessary to register the title of a book or other work on which copyright was desired on or before the day of actual publication. This has been changed by the present law.

In publishing a work under copyright protection it is first of all necessary to print the words

COPYRIGHT (YEAR.)

BY (NAME OF COPYRIGHT CLAIMANT.)

upon the title page, or the page immediately following, of the article, if it be a book, periodical, dramatic or musical composition. The copyright notice may consist of the word "Copyright" or the abbreviation "Copr." accompanied by the name of the copyright proprietor, if the work be a photograph, map, design for a work of art, reproduction of a work of art, drawing of a scientific or technical character, print or pictorial illustration. Indeed any of these classes of works may even be copyrighted by printing on their face the letter C enclosed within a circle accompanied by the initials, monogram, mark, or symbol of the copyright proprietor, provided that on some accessible portion of such copies, or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear.

After a work has been published, and that means issued to the public, or publicly sold, it should be registered at the Copyright Office, and this should be done upon the blanks which are furnished by the Register of Copyrights. As the application for registration must specify the class of copyrightable subjects to which the work in question belongs, it is desirable to describe it to the Register of Copyrights sufficiently for him to send to the intending applicant the proper blank for this purpose. Full directions for making this registration will be supplied by the Register of Copyrights, so that any person can clearly understand how to do it. The application for copyright is accompanied by an affidavit of American manufacture, giving the facts as to where and when the work for which copyright is desired was made. The application should be returned to the Register of Copyrights at Washington accompanied by a fee of \$1.00, and upon due entry of this the certificate of copyright will be returned to the applicant.

It is not obligatory immediately to register copyrights, but it is necessary before any action at law can be taken by the owner of the copyright for infringement of his rights by others, and, therefore, it is desirable to make application as soon as convenient after the publication of the work.

After the copyright has been secured by publication of the work with the notice of copyright as above stated, there shall be

promptly deposited in the Copyright Office, or placed in the mail addressed to the Register of Copyrights, Washington, D. C., two complete copies of the work thus published, which copies, if the work be a book or periodical, shall have been manufactured in the United States of America; or if such work be a contribution to a periodical, for which contribution special registration is required, only one copy of the issue or issues containing such contribution is required. No action or proceeding at law shall be maintained for an infringement of copyright in any work until the deposit of copies or registration of such work shall have been complied with. It is not necessary to prepay the postage on the articles which are deposited in accordance with this law, as the postmaster to whom they are delivered must give, if requested, a receipt for them and mail them to their destination without cost to the copyright claimant.

Registering Copyright of Unpublished Works.

Copyright may also be obtained for the work of an author of which copies are not reproduced for sale by sending to the Register of Copyrights, with a blank properly filled out, one complete copy of such work, if it be a lecture or similar production or a dramatic or musical composition; of a photographic print if the work be a photograph; or of a photograph or other identifying reproduction if it be a work of art or a plastic work or drawing. If a work which has been thus copyrighted before publication shall later be published, deposit of copies must be made with the Register of Copyrights as above explained, in reference to works which are copyrighted by publication with a printed claim of copyright on them.

SALES.

Elements of Valid Sale—Parties—Conditions and Warranties— Performance—Delivery—Fraud and Mistake—By Agents.

THERE are innumerable questions of importance which arise out of a sale of personal property which were not discussed under the general subject of contracts heretofore appearing. It will therefore be our object to obtain a practical knowledge of the principles upon which the law of sales is based.

A sale has been judicially defined as a contract to pass rights of property for money which the buyer pays or promises to pay to the seller for the goods bought. To constitute a valid sale there must be a concurrence of the following elements: (1) Parties competent to contract; (2) mutual consent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer, and (4) a price in money paid or promised. It is important before analyzing the elements of a sale to distinguish this species of contract from a bailment, lease, and an exchange or barter. If the identical property delivered is to be restored again to the original owner, the relation established is one of bailment; if not, a sale is made. However, the delivery of personal property with the right to return the same is not always a bailment. The distinction depends upon whether title has passed upon delivery of the goods.

To illustrate, if John Doe delivered goods to Richard Roe with the understanding that if satisfactory he is to retain them, the contract is one of bailment. When Richard Roe elects to keep the goods the contract becomes a sale. The contract would be construed as a sale if Richard Roe kept the goods beyond a reasonable time. The Supreme Court of Pennsylvania has decided the principle that, if John Doe agrees to a present transfer of the absolute title in personal property to Richard Roe, with the privilege of returning them if not satisfactory, a sale would be consummated. Where an agreement, while it is designated an option, provides for the absolute transfer of shares of stock to the assignee, who is during the continuance of the so-called option to pay interest on the purchasing value of the stock, and if he refuses to purchase, is to assign to the original assignor, the agreement, if carried out, is a sale subject to rescission by the

GENERAL LETTER OF ATTORNEY IN FACT

When Creditor is not Represented by Attorney at Law.

In the District Court of the United States

For the

District of

IN THE MATTER OF

Bankrupt.

No.

In Bankruptcy.

To

of
in the County of and State of
do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for and in name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to Bankruptcy; and in the choice of Trustee or Trustees of the estate of the said bankrupt, and for to assent to such appointment of Trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due under any composition, and for any other purpose in interest whatsoever, with full power of substitution.

In Witness Whereof, have hereunto signed
name and affixed seal the day of
A. D. 191

Signed, Sealed and Delivered }

IN THE PRESENCE OF

L.S.

L.S.

GENERAL POWER OF ATTORNEY

Know all Men by these Presents, That

have constituted, made and appointed, and by these Presents do constitute, make and appoint

lawful Attorney for and in name and stead, and to use,

to ask, demand, sue for, levy, recover and receive, all such sum and sums of money, debts, rents, goods, wares, dues, accounts, and other demands whatsoever, which are or shall be due, owing, payable, and belonging to or detained from in any manner of ways or means whatsoever,

giving and granting unto said Attorney by these Presents full and entire power and authority, in and about the premises, to have, use, and take all lawful ways and means, in name for the purposes aforesaid; and upon the receipt of any such debts, dues, or sums of money aforesaid, acquittances, or other sufficient discharges, for and in name to make, seal and deliver, and generally all and every other act and acts, thing and things, device and devices in the law whatsoever needful and necessary to be done in and about the premises, for and in name to do, execute and perform, as fully, largely and amply, to all intents and purposes, as might or could do, if personally present, or as if the matter required more special authority than is herein given; and Attorneys, one or more under for the purpose aforesaid, to make and constitute, and again at pleasure to revoke; ratifying, allowing, and holding for firm and effectual, all and whatsoever said Attorney or substitute shall lawfully do in and about the premises, by virtue hereof.

In Witness Whereof, have hereunto set hand
and seal the day of , in the year of our Lord
one thousand nine hundred and

Signed, Sealed and Delivered }

IN THE PRESENCE OF

L.S.

L.S.

vendee, and if it is not rescinded he is liable for the purchase price.

The difference between a lease and a sale resides in the fact that the former is only a temporary transfer of possession, while the latter is an absolute transfer of title. This question most frequently arises in cases where pianos and sewing machines are delivered under contracts providing for installment payments in the nature of rental, and, further, that the property shall vest in the *user* upon payment of the last installment. Such contracts are sales, and not leases, regardless of what the parties may term them, but such a transaction may be made a lease if the contract contains an express proviso that the title shall not pass until the last payment has been made. If such class of goods are hired in good faith, with the privilege of purchasing at a stated price in addition to the periodical payments, a lease is made, which upon the exercise of the option to purchase is converted into a sale.

If goods are "consigned" for sale, it is a bailment and not a sale to the consignee; the goods do not become his property or liable to be attached by his creditors. The fact that the goods consigned were invoiced at a stated price does not constitute the transaction a sale, unless the terms of the consignment be such as to make the consignee, when the goods are sold, the purchaser and principal debtor for the goods.

In Pennsylvania a chattel mortgage is invalid, but in New Jersey and many other States a mortgage of personal property will be enforced. The distinction between a sale and a chattel mortgage is that in the latter there is but a conditional transfer of title to secure a debt, while in the former the transfer and possession are absolute.

A consideration paid or to be paid is essential to a sale. In the case of a gift, a transfer of personal property is made for what is known technically as a "good" consideration, such as love, affection or charity. In the case of a sale a money consideration must exist.

The question has frequently arisen whether or not a particular transaction is a sale or a mere barter or exchange of goods. In a well-known Pennsylvania case B had in his possession a quantity of coin which he believed to be current money of a foreign country, and offered it to A for the purchase of certain goods. A, being ignorant of its value, asked time for inquiry, and having taken several days for that purpose, during

which he satisfied himself on the subject, delivered to B a quantity of goods for which he received the coin. After keeping the coin three years A discovered that it was no good, after which he brought suit against B for the price of the goods sold and delivered. The Court held that the transaction was an exchange and not a sale of goods, and consequently A had no right of recovery. If the money paid was counterfeit, the debt for goods bought would not be discharged, but when the seller has examined and accepted foreign coin at the time of the bargain, it cannot be denied that he received what he bargained for. The current coin of the country may, by express agreement of the parties, be taken at the risk of the seller. If the consideration for the transfer of personal property is a price in money, or if the value of the goods is determined by a price fixed in money, the transaction is a sale. If no price is fixed a barter or exchange results. For example, if the consideration for delivering twenty pounds of coffee at thirty cents per pound is fifty pounds of sugar at ten cents per pound, the transaction is a sale. If, however, the transaction was made on the basis of delivering twenty pounds of coffee for fifty pounds of sugar, it would be a barter or exchange.

It will be observed from the above remarks that there are many transactions which involve more or less conveyances of an interest in personal property, but they are not sales unless they are present transfers of the entire title for a legal consideration.

Parties to the Contract of Sale.

The competency of a party to enter into a valid contract has been considered under contracts, and it will therefore suffice in the present connection to state that infancy, insanity and intoxication will render a party incompetent to enter into a valid contract of sale. No man can sell goods and convey a valid title to them unless he is the owner or lawfully represents the owner. A person, therefore, however innocent, who buys goods from one not the owner, obtains no property in them whatever, and even if in ignorance of the fact that the goods were lost or stolen, he resells them to a third person in good faith, he remains liable to the original owner. A man may make a valid agreement to sell goods or property not yet his, and even goods not yet in existence.

The essential parties to a valid contract of sale are the vendor (seller) and the vendee (buyer). There must be a clearly defined offer on the one hand and an acceptance of that same offer on

the other hand. In other words, the minds of the parties must meet; there must be mutuality of assent. The following illustration will emphasize this point: A wrote to B making an offer to sell a cargo of good barley. B replied accepting such offer, but added that he expected to receive fine barley and full weight. A wrote back, "You say you expect fine barley. Upon reference to my letter you will find no such expression. As such I must decline shipping the same." Good barley and fine barley are terms well known in the trade, and fine barley is the heavier of the two. There was no valid acceptance of the original offer and hence no contract of sale. Every merchant dealing either personally, by agent or through correspondence should exercise care in seeing that the terms of either an offer or acceptance of a contract of sale are not ambiguous or unintelligible. It should be borne in mind that where the acceptance of an offer is made by either letter or telegram, the contract is complete as soon as the letter or telegram of acceptance is deposited in the mails or telegraph office, and further that where the offer is communicated by letter and the acceptance by telegram, the acceptance is not complete until the offeror has received notice of such acceptance.

A mistake by the buyer of the goods in supposing that the article bought by him will answer a certain purpose for which it turns out to be unavailable, is not a mistake that would afford grounds for pretending that he did not assent to the bargain.

A mistake as to the person with whom a contract of sale is made may or may not avoid the sale. In the common case of a trader who sells for cash it can make no possible difference to him whether the buyer be Harrigan or Jones, and a mistake of identity would not avoid the contract. In some cases the question of identity is an important element in the sale, as, for example, if the sale be on credit, where the solvency of the buyer is the chief motive which influences the assent of the vendor, or when the purchaser buys from one whom he supposes to be his debtor and against whom he would have the right to set off the price, a mistake as to the person dealt with under such circumstances would prevent the valid formation of a contract of sale on the ground of absence of assent. Assent may be implied by the conduct of the contracting parties, as by a nod, gesture, or even silence, under certain circumstances.

An agreement that an offer shall be left open for acceptance for a stipulated time is known as an option, which must be supported by a valuable consideration. If so, the offer cannot be withdrawn or retracted during the time for which the option

was to run. If the offer be withdrawn before the expiration of the option damages can be recovered by the injured party.

The Subject of Sale.

Anything recognized as property may be sold, and as a general rule such property must be in actual or potential existence and must be definitely described and separated from a mass. By potential existence of property is meant a hope or expectation of having property to sell, founded on a present right of possession. For example, a man may sell the crops to be grown in his field or the unborn young of his flock. It has been held by respectable authority that a contract to sell fish which might afterward be caught did not vest property in the fish when caught in the purchaser. If a vendor sells property not belonging to him, and subsequently acquires a title to it before the repudiation of the contract by the purchaser, the property in the thing sold vests immediately in the purchaser. Likewise in a contract of "sale or return," where the vendor had no title at the time of sale, but acquired one afterward, before the time limited for the return, the buyer who had allowed the time to elapse without returning the goods sold could not set up the failure of consideration in the original contract as a defense in an action for the price.

A definite description must be made of the subject matter of the sale to render same valid. With the exceptions hereinafter mentioned, the subject matter of a sale must be separated from the mass, so as to be capable of identification. An agreement to sell five hundred bushels of corn, to be measured out of a bulk, would not convey title until the required number of bushels had been measured out and separated from the mass.

Conditions and Warranties. Sales by Samples.

A statement or promise which forms the basis of a contract, and the untruth or non-performance of which discharges the same is termed a condition, and the fulfillment of the condition is a condition precedent to the attachment of any obligation on the party in whose favor it exists. A warranty, on the other hand, is an agreement with reference to the subject of the contract, but collateral to its main purpose. It is difficult to treat these subjects of representations, conditions and warranties separately, so closely are they associated together, but the distinction between them is of the most vital importance. If a representation is made

when a contract of sale is entered into relative to the subject matter thereof, and such statement is false, no valid contract was ever in existence. A party to a sale may make promises which may be either independent or conditional upon one another. If independent, failure by one of the parties to keep his promise does not discharge the contract. But when the promise of one party is conditional upon the promise of the other the law holds that the performance of the latter is either a condition precedent or concurrent to the obligation of the other party to perform his promise. A condition in a contract of sale is held to form the basis of the contract, the non-performance of which would discharge all obligations arising thereunder. A warranty differs from a condition in a contract of sale in that fulfillment is not a condition precedent and its breach does not discharge the contract. Upon the breach of a warranty the injured party has the right to recover damages which he has sustained as a result of the failure of the other party to perform his promise. If the parties regarded a particular statement as an essential term of the contract, such a statement is a condition, its performance is a condition precedent and its failure effects a breach. If the parties did not regard a certain statement as fundamental, it is a warranty, the breach of which entitles the injured party to damages only. The intentions of the parties in this regard is arrived at by strictly interpreting the language of the contract and the circumstances under which it was made.

When goods are sold by description there is an implied condition that the goods shall correspond substantially with the description. Suppose a man should offer to purchase peas of another, but receives beans. This illustration is simple, but it illustrates a general principle to the effect that there was no warranty that the vendor should sell the vendee peas. The contract was to sell peas, and if any other commodity is sold there is a non-performance of the contract. In the sale of a described article, a tender of an article answering the description is a condition, which, if not performed, entitles the buyer to reject the article. In Pennsylvania the Courts have held words of description to be more in the nature of warranties. For example, where the article sold was described in the bill of parcels as "blue paint," it was held that this amounted to a warranty that the article should be blue paint and not a different commodity.

Having pointed out the meaning of the term "warranty," one or two examples will furnish an illustration thereof as applied to a contract of sale. In a recent Pennsylvania case, A

wrote to B, "Our leather is now thoroughly tanned; will re-ship on Saturday, hoping the same will exist as before," and B replied: "If your leather is thoroughly tanned now, and all right in other respects. we will take it as before." The Court held in a suit for the price of the leather that there was a warranty to furnish thoroughly tanned leather. Upon an executed sale of a chattel upon an express warranty of quality, the buyer has no right to rescind the contract for breach of warranty and return the chattel, but if he has paid the price he may sue on the warranty and recover damages; or if he has not paid the price he may set off the damages. Where, however, the warranty was fraudulent, the buyer may rescind and return within a reasonable time, and if he has paid the purchase money, he may recover it back, or if he has not, he may defend against an action for the same. Where the contract is executory, as where a particular article has been ordered without having been seen, and it is warranted to be of a given quality or description, the buyer is not bound to keep it or to pay for it on any terms. This is so even though no fraud was intended by the vendor, but in such case the buyer must elect within a reasonable time whether to accept the article or not, and where the facts are disputed the question of reasonable time is one for a Court to decide.

In another well-known case a rivet-maker wrote to a dealer in iron: "We must have the very best quality for this purpose, and we should want it right along, all the time of the same quality, if we found it satisfactory," and the iron dealer replied: "As the best way of finding out whether the bar will answer your purpose is to try it, we suggest that you take a sample carload." It was held by the Court that the statement was no warranty of the quality of the iron. But upon a sale of slate, to be "free from scabs and gray backs," if such slate were not furnished the purchaser would be entitled to a deduction for his damages for breach of warranty.

In a sale of machinery there is no warranty that a machine will perform certain functions. If a machine is constructed in accordance with the instructions given, it is no defense in a suit for its price that it would not perform the work for which it was designed. It has been held that where a known described and definite article is ordered and supplied, there is no warranty that it will answer the particular purpose intended by the buyer, and this would be the case, though such purpose be stated by the purchaser at the time of the sale. Sometimes a machine is warranted to give satisfaction, but where, for example, a war-

ranty is made that a reaping machine will give satisfaction a retention of the reaper during the harvest, with no notice of defects, entitles the vendor to recover the purchase price. If machinery is sold with a warranty to give satisfaction, failure of notice to the seller to put the same in satisfactory condition is an election to retain, and the purchaser becomes liable for the contract price.

If a horse is warranted to be sound and kind, and is returned after one day's use by the purchaser upon the grounds that the horse is not kind, and it shortly afterward dies from founder, if the purchaser used the horse properly he can recover for a breach of warranty.

When merchandise of any description is delivered to the buyer on trial or on approval, title to the property passes to the purchaser (1) when he signifies that same meets with his approval, or (2) on the expiration of the time limited for trial, or (3) if no time is limited, on the expiration of a reasonable time. However, if goods are delivered to the buyer with the understanding that the property is to pass to him immediately, but that he may thereafter return the same if he so desires, the property passes to the buyer, and in case of a return of the goods, reverts in the seller.

Performance of Contract of Sale.

Certain rights and obligations are created by every contract of sale, the non-performance of which effects a breach and fastens liabilities on the guilty party. The vendor must, to discharge his obligations under a contract of sale, make delivery of the goods sold, the goods to comply with all warranties. It should be borne in mind that a warranty is a contract, and requires a valuable consideration to support it, and if the contract of warranty is made at the same time or at a reasonable time before the contract of sale is entered into, the consideration for the latter will always support the former. If, on the other hand, a warranty is made after the contract of sale is closed, a separate consideration is required to support such a warranty. In connection with warranties, mere expressions of opinion or general commendation of the goods do not constitute binding warranties. Some positive statements of facts must be made, and even if such a statement was made it would not cover patent or obvious defects. The law of sales is based upon the maxim *caveat emptor*, which literally translated means "let the buyer beware." When

goods are sold by sample there is an implied warranty that the goods delivered will be of the same species and kind as the sample. There is, however, no implied warranty against latent defects in the goods which are present in both sample and bulk. In all cases where provisions are sold by retailers direct to consumers, or where they are sold by wholesalers to retailers, there is an implied warranty that the goods sold are fit for use as food. In Pennsylvania the act of May 4, 1889, establishes the law in this regard.

Delivery.

Upon a cash sale the buyer is entitled to an immediate delivery of the goods upon payment or tender of cash. The buyer is also entitled to immediate delivery when the sale is on credit and no definite time is fixed for delivery. It may be stated as a general proposition of law that the vendor is not obliged to deliver goods sold to the purchaser's residence or place of business. The vendor's contract is performed when he places the goods at the disposal of the buyer so that they may be removed by him. Special agreements as to delivery are usually made. Consequently when the contract provides for place of delivery, the transfer must occur at the place designated. In the absence of a designated place of delivery, the goods must be held ready for delivery at the place where they were at the time the sale took place. As we learned in our study of the subject of Common Carriers, delivery to a common carrier is delivery to the purchaser, but title to the goods shipped may be retained after delivery to the common carrier if a bill of lading is written in the name of the shipper providing that the goods are delivered subject to the order of the shipper. Before delivery of possession is effected the bill of lading must be indorsed and transferred by the shipper or the common carrier who is made the shipper's authorized agent.

In the performance of any contract of sale, delivery must be made within the time specified; if damages are occasioned by delay, the purchaser has a right to recover same. In the absence of any condition as to time of delivery the seller will be given reasonable time. It is further the duty of the vendor to deliver the exact quantity and a breach of contract occurs if either more or less are delivered than ordered. Many contracts of sale are entered into every day in a careless manner, and contain such general terms as to quantity as "about" and "more or less." In

such case the vendor is not bound to deliver the exact number mentioned, but is deemed to have performed his contract upon delivery of approximately the number set forth in the contract. If it is agreed between the parties that the goods be delivered by installments, and the contract is entire, failure to deliver one installment or to accept same will give the injured party the right to rescind the contract and sue for damages.

Should the vendor retain possession of goods after a contract of sale is concluded, fraud would be presumed. Good faith in the transaction must be shown to overcome this presumption. In case goods are sold to two or more different persons by conveyances equally valid, the law will give the person lawful possession who obtains possession first.

Upon receiving goods, the buyer is given by law a reasonable time to examine the same to ascertain whether they are the same quantity and quality as he ordered. Oftentimes an acceptance is made conditionally, i. e., acceptance may be conditional upon further performance of the contract by the vendor, as, for example, to remedy certain defects. The acceptance is made absolute when the defects are remedied by the seller.

When the buyer has accepted a delivery of goods, he thereupon becomes liable for the cost, and if no price was agreed upon he is liable for a fair or reasonable price, in law known as a *quantum meruit*. The seller of goods has the right to insist that the price be paid in money. It is altogether optional whether he accept a promissory note or check. Payment by note or check is conditional, and only becomes absolute when payment on the instrument has been made. If a man accepts a check and neglects to present the same to bank, and the bank should fail, the payment would be absolute and the loss would fall on the holder of the check (the vendor). The purchaser is liable for any loss occurring by transmitting the payment through the mails or other adopted agency.

Tender of Payment.

A technical tender of payment, such as will be recognized in law, is quite different from the common understanding of what constitutes a valid tender.

A tender is an offer to perform an obligation which a party is legally bound to perform and comprises six essential elements. A tender, in the first place, must be made in the currency which is legal tender for the payment of debts. The precise amount

due must be tendered, and a tender of a greater or less sum will not be valid. Furthermore, the money must be produced and offered to the creditor and must be altogether unconditional. The tender must be continuous. The effect of making a legal tender of the price of goods to the vendor is to avoid the accumulation of interest and to protect the buyer from any costs in case suit is brought for the debt. When there has been a delivery of the goods by the seller and an acceptance thereof by the buyer, accompanied or followed by a payment or tender of payment of price, the contract of sales may be said to have been performed.

Fraud and Mistake.

It is unnecessary to analyze the elements of fraud and mistake which was covered under the head of "Reality of Consent" in our study of contracts. In connection with sales, it will suffice to say that the effect of mistake is to render the contract void. A person who has entered into a contract of sale, void on the ground of mistake, may, if it is still executory, repudiate it, and successfully defend an action upon it. If he has paid money or delivered goods under the contract he may, upon returning what he has received under it, recover the money or the goods. Upon failure of the seller to perform his part of the contract, the buyer may put an end to it, and recover in an action for money had and received any part of the price which he may have advanced.

If a party to a contract of sale has been induced to enter into it by fraud of the other party, the contract is voidable at his option. Fraud in this connection is used in the sense of deceit and comprises three essentials. There must be a false representation or concealment of a material fact. There must be an intention to deceive or a negligent statement of a falsehood. The misrepresentation or concealment must have induced the deceived party to act. A man is not bound by a contract of sale to which his consent has been obtained by fraud, because, but for the fraud, he would not have given his consent. As ignorance of the law is never a defense, a misrepresentation of the law does not constitute fraud. There must be a misrepresentation of a material fact to render a contract fraudulent.

A fraudulent contract of sale is voidable, i. e., the injured party may rescind it or he may affirm it. If he affirm the contract he may recover damages for the fraud in an action of deceit, or if sued for the price he may set up the fraud in reduc-

tion thereof. Such a contract must be affirmed or rescinded in whole and an election once made is final. If the party defrauded rescinds the contract, he may set up the rescission in defence of an action on the contract, or if such party be the buyer and has paid the price, he may maintain an action to recover the amount. If the injured party be the seller and has delivered the goods, he may maintain an action of replevin and recover the goods delivered.

A fraudulent contract being voidable and not void it follows that when innocent third persons have for value acquired rights under the sale, their rights cannot be interfered with. The rule is also stated to be an application of the principle of convenience that when one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. For example, when a sale is procured by fraud, the property in the goods is transferred by the contract, subject to the seller's right of rescission, and one who purchases in good faith from the fraudulent buyer before the sale is rescinded acquires a good title. But where a person obtains goods by fraudulently impersonating a third person, or by pretending to be the agent for the third person to whom the owner supposes he is selling the goods, the person so obtaining the goods acquires no title and a *bona fide* purchaser from him stands in no better position.

A sale made with the intent on the part of the seller and buyer to delay, hinder or defraud creditors of the seller is fraudulent and such creditors may avoid the sale, which, although fraudulent as to the creditor, is valid between the contracting parties.

Sales by Agents.

An agent may enter into a valid contract of sale which shall be binding upon his principal if he acts within the scope of the express or implied powers with which he is clothed. A broker unless specially restricted has unlimited power to buy and sell. He may sell by sample, but not on credit, without authority. A factor may receive payment, sell on credit, appoint sub-agents and warrant the goods sold. A factor may sell in his own name, but a broker cannot. In the case of a pledgee an absolute sale cannot be made until there has been a default by the pledger; the sale must be made at public auction, due notice thereof must be given, and, as is the case with other agents, a pledger cannot purchase at his own sale the goods sold.

DOMESTIC RELATIONS.

*Husband and Wife—Parent and Child—Guardian and Ward
—Master and Servant.*

THE law applicable to domestic relations, regulating the rights and duties of the household or family, constitutes one of the most interesting and important subjects included in the entire realm of jurisprudence, and will be considered under the following five divisions—Husband and wife, parent and child, guardian and ward, and master and servant.

In primitive times the wife was regarded as practically a slave, the captive or purchase of her husband, and mutual rights and duties were unknown. The rights were all with the strong (the man) and the duties belonged to the weak (the woman). The husband's control over the wife's person, as well as over the property she possessed, was regarded as law until comparatively recent times. According to the early Roman law, the husband could chastise, sell, or even kill his wife; he became the possessor of the wife's property and was entitled to her labor and earnings. The wife had the right to compel support and was entitled to a share of her husband's property upon his death.

Under the doctrine of the so-called "free marriage," which was developed at a later period, the husband and wife were regarded as partners, the husband having the right to choose the home, to regulate household expenses and the right of custody and education of the children. Under the English Common Law, husband and wife are regarded as one person, but in equity the wife's separate existence was early recognized and she was given the right to enjoy, control and dispose of her separate estate. The rights of married women at the present time are regulated by statute and in Pennsylvania a married woman has the same rights as a single woman with the exception that she cannot become surety, guarantor or accommodation indorser for another. So strong are the moral obligations which attend marriage, and the training of offspring, so intimately blended with the welfare and happiness of mankind are the ties of wife and child, that scarcely anyone grows up without some knowledge of the general principles of law applicable to these topics.

WILL

Be it Remembered, That I,

being of sound and disposing mind, memory and understanding, and considering the uncertainty of life, do therefore make, publish and declare this to be my last WILL and TESTAMENT, in manner and form following, that is to say:

Item: I order all my just debts and funeral expenses to be paid by my Execut hereinafter named, as soon as conveniently may be after my decease.

SECOND.—I give, devise and bequeath unto

all my Estate, real, personal or mixed, of whatever nature or kind, or wheresoever situate at the time of my decease,

AND LASTLY.—I do make, constitute and appoint

to be the Execut of this my last Will and Testa ment, hereby revoking all former Wills and Testaments by me at any time heretofore made, and declaring this to be my last Will and Testament.

In Witness Whereof, I have hereunto subscribed my name, and affixed my seal, the day of in the year of our Lord one thousand nine hundred and

Signed, sealed, published and delivered by the testal above named, as and for last Will and Testament, in the presence of us, who have hereunto, at request, subscribed our names in presence, and in the presence of each other, as witnesses hereto.

PETITION FOR APPOINTMENT OF GUARDIAN

In the Orphans' Court of County.

To the Honorable the Judges of said Court:

The Petition of

minor the age of fourteen years, resident within the said County,

respectfully represents:

That born
That the child of

That no Guardian to take care of person
and estate:

therefore pray the Court to
Guardian for the purpose aforesaid.

And will, &c.,

Earliest of Institutions.

The family was the earliest of all social institutions, preceding that of government itself. The propagation of offspring afforded the only means whereby society could hope to grow into a permanent and compact system. Families at first lived under the paternal government of the person who was their patriarch or chief. But the increase in families caused division, and when a common enemy threatened it became necessary to unite for mutual protection. Thus governments were developed, which merely represent a collection of families.

Marriage may be defined "as a relation divinely instituted for the mutual comfort, well-being and happiness of both man and woman, for the proper nurture and maintenance of offspring, and for the education in turn of the whole human race." Marriage necessarily affords a discipline to both sexes. Woman's condition becomes one of comparative subjection; man is tamed by her gentleness and the helplessness of tender offspring, and for their sake he puts a check upon his baser appetites and concentrates his affection upon the home he has founded, of which he naturally becomes the head. It is the law, growing out of the relationship incident to marriage, which we will proceed to briefly investigate.

Marriage supposes a home and mutual cohabitation. It is for the wife to love, honor and obey; it is for the husband to love, cherish and protect. The husband, as head of the family, has the right to fix the family name. By custom the wife takes the surname of the husband, but inasmuch as the husband may lawfully change his name, there is no legal objection to his adopting his wife's family name should he so desire. The Court has power to change the name of a wife against the wishes of her husband, where her true interest will thereby be promoted; but a Court will reject an application for such a change where the wife and husband are separated, and to grant such change would seem to close the door to reconciliation.

Duty of Cohabitation.

The most important duty which attaches upon both husband and wife is that of cohabitation. Cohabitation does not imply the daily and nightly residence under the same roof of a husband and wife; circumstances of life, such as business duties, domestic service, etc., may separate husband and wife, and yet there may be an existing state of cohabitation. The husband is given the right to choose the home or domicile; he may locate his home

wherever he pleases, and, as a general rule of law, the wife must follow her husband throughout the world. A husband cannot lawfully require his wife to reside in a place which would endanger her health or where she would be subjected to unreasonable hardship or distress. If the wife be a minor, her husband's right to her person is paramount to that of her parents or guardian. The right of custody enables the husband to recover his wife from any person who would draw her from him. Parents and near relations stand on a different footing than strangers in this regard, but when one executes or attempts to execute a malicious intent to alienate the affection of a wife from a husband the latter may sue for damages for alienation of affections.

A husband has no right under the law of Pennsylvania to inflict corporal punishment on his wife. It has been held that a husband cannot, for the purpose of compelling his wife to live with him, imprison her in his own home. If a husband is guilty of violence or cruelty the wife may have him arrested, upon which he will be compelled to furnish bail to keep the peace. Blackstone says that in case of any gross misbehavior the husband can restrain his wife of her liberty, but the better authority seems to be that laid down by Chancellor Kent, to the effect that the husband, in case of misconduct by his wife, may resort to "gentle restraint." Such restraint would be justified if the wife should attempt to wantonly destroy her husband's property, or where the wife has eloped with a libertine, etc.

It is the husband's privilege to supervise or regulate the household, and the law regards the wife as his representative or executive officer properly intrusted with domestic details. The husband may determine the number and character of visitors to his house, the style of entertainment and the arrangement of the rooms, etc., and the wife is legally bound to conform to her husband's tastes and habits, even to his eccentricities. Whims and caprices of the husband need not be obeyed if they endanger the wife's health.

Right of Support.

Another essential duty which the law casts upon a husband is that of support and maintenance. This he is bound to do even though the wife has a separate estate of her own. This duty applies as much to a husband who is a minor as to an adult. But no husband is required to support his wife if she, without reasonable cause, refuses to live with him. Where a man lives with a

woman and holds her forth to the public as his wife, he cannot deny it when charged with liabilities as her husband.

A husband is liable for groceries purchased by his wife and necessary for the use of his family, in the absence of notice not to sell to her on his credit, and even after such notice if he has failed to supply her with means to purchase same. A husband is liable for his wife's contracts for necessities. It has been held that where a wife in the presence of her husband enters into a contract for board, without any express promise to charge herself or her separate estate, the board contracted for being such as her husband is bound to furnish, he, after the board is furnished, is alone liable for the bill, although the other party may have intended to charge it to her. Where a wife obtains necessities for the family of herself and husband the presumption is that she does so as his agent, and if she sends for a physician to attend herself or children she will not be held liable to pay for his services out of her own separate estate, unless she specially agrees to do so.

A husband is legally liable for the funeral expenses of his wife, even where in her will she directs same to be paid out of her separate estate. But if the husband is insolvent the estate of his deceased wife is liable for her medical and funeral expenses. The Supreme Court of Pennsylvania has held that where a husband without justification deserts his wife and children, he is liable for necessities ordered by and delivered to the wife for the use of herself and children, and this would be the case even though the wife had repudiated the husband's offer of allowance. It is unnecessary to further elaborate on the duty imposed by law on the husband. Suffice it to say that the support which the law requires a husband to give his wife and children is such as is reasonable, considering his situation and condition in life.

It should be borne in mind, however, that the duty of the husband to support his wife and family does not extend to the support of his wife's children by a former marriage. Strictly speaking, stepchildren form no part of his family. An antenuptial agreement to support stepchildren is not binding.

Services of a Wife.

As a corollary to the husband's duty to support his wife, the marital relation imposes the duty on the wife to render services to her husband, the extent of which it will be well to consider.

It is a legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes on her husband, because of the marital relation. Services performed by a wife for another for compensation are presumed to be done on the husband's behalf. Upon this theory the law allows the husband a right of action for damages resulting from loss of his wife's services occasioned by accident due to the negligence of a third party. Although, as a general rule, a husband is entitled to receive all money paid for his wife's services, yet when those services are gratuitously rendered he has no right to compensation. If she is afterward rewarded by a voluntary gift, her husband can have no more claim to it than a stranger.

In Pennsylvania, since the act of June 3, 1887, the wages of a married woman earned by her labor belong to her, and where a married woman attends upon a boarder, cleans his room and administers medicine to him when he is sick, she is entitled to recover compensation for her services in her own name, although the contract for boarding was made with her husband. Such services are not those of an ordinary house servant, and, therefore, the fact that she did not present a claim for her services for a considerable time after they were performed will not prevent a recovery. A suit for the value of the services of a married woman in the temporary employment of nursing is properly brought in the name of the husband alone; where, however, the employment is of a permanent character so as to become a trade or business she is entitled under the act of June 3, 1887, to recover in her own name. When a married woman leases and runs a boarding house, its profits belong to herself and not to her husband, and this is so even though he be permitted to live and be maintained upon the property and voluntarily bestows labor in running it.

It has been decided in Pennsylvania that the earnings and services of a wife in her husband's business do not belong to him and property bought with such earnings are not subject to levy and sale by a husband's creditors.

Respective Property Interests.

At common law the personal property belonging to a woman at the time of her marriage or acquired afterward by gift, bequest or purchase, vested in the husband, but the wife acquired no rights whatever in the personal property of the husband. This

rule, however, has been considerably relaxed by statute. In Pennsylvania, by the terms of the act of June 8, 1893, a married woman is given the same rights and powers as an unmarried person to "acquire, own, possess, control, use, lease, sell or otherwise dispose of any property of any kind, real, personal or mixed, and may exercise the said right and power in the same manner and to the same extent as an unmarried person." But a married woman cannot mortgage or convey her real property unless her husband join in such mortgage or conveyance.

Where property is claimed by a married woman as against the creditors of her husband, she must show by evidence which does not admit of reasonable doubt either that she owned it at the time of her marriage or else acquired it afterward by gift, bequest or purchase. In case of a purchase after marriage the burden is on the wife to prove distinctly that she paid for it with funds which were not furnished by her husband, in the absence of which the presumption is most strong that the husband furnished the means of payment, which rule applies the same to real property as to personal property. It will always be presumed by law, in the absence of evidence to the contrary, that household goods, where husband and wife are living together, belong to the husband. A married woman's judgment note for the purchase of land is valid, but a married woman who has borrowed money from her father to purchase a farm and who has given a bond and mortgage to secure the debt, cannot, after her father's death, relieve herself from liability upon the bond by tendering to his executor a deed for the land. A wife cannot go bail for her husband or upon any recognizance for another. The right of a married woman to become surety for another is expressly prohibited in Pennsylvania by statute.

A conveyance of real estate by the husband during coverture for the purpose of defeating the wife's rights is fraudulent and void as to her. So far as personal property is concerned, the husband can transfer whatever he desires. But a husband cannot transfer personal property to defeat a wife's right to alimony or maintenance, and any transfer of personalty made with obvious fraudulent intent upon the rights of the wife will be set aside. For example, where the transfer is a mere device by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share in his personal property, it would be held by the Courts as a void transfer.

A conveyance or devise of lands to a husband and wife does

not create a joint tenancy, but what is known as an estate in entirety, and is confined to the relation of husband and wife. A conveyance to husband and wife, if nothing else appears, vests in the grantees an estate in entirety, whether the consideration was furnished by both or entirely by one of them. Upon the death of either, his or her share passes, by the doctrine of survivorship, to the other. An annuity given to a husband and wife belongs solely to the husband during their joint lives, and is liable for his debts. Where payable to himself and wife, it remains during his life subject to his control, and the wife has no legal interest therein until his death.

A bequest to a husband and wife of a sum of money in equal proportions does not create an estate by entireties, and hence the husband's share, on his death in the lifetime of the testatrix, lapses, and does not pass to the wife by survivorship. Likewise a bond and mortgage, taken in the name of a husband and wife, will not vest in them jointly, so that either will have the right of survivorship on the death of the other where they contribute equally in making up the loan out of their separate property, but on the death of either the interest of the decedent will vest in his personal representatives. In case husband and wife, each being possessed of means, have made investments jointly, each supplying half, and have taken the securities in their joint names, the wife, on the decease of the husband during her lifetime, does not take the whole by the right of survivorship. The rule which prevails as to the right of survivorship, in the case of united holdings of real estate by husband and wife, is not applicable to personalty. In case of an estate in entirety being created, neither husband nor wife, without the consent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other.

During marriage the husband has the entire use of the estate in entirety. His right to enjoy the use, rents and profits of the estate may be conveyed, leased, mortgaged or assigned by him, and the husband's interest may be reached by his creditors.

A married woman under the terms of the Pennsylvania act of May 4, 1855, may obtain the privilege of a *feme sole* trader, i. e., to enjoy the right of engaging in business, contracting debts, etc., separate and distinct from her husband, and a woman decreed to be a *feme sole* trader under this act may convey her real estate by deed in which her husband does not join. Such conveyance, however, does not divest the husband's estate as tenant by the curtesy. The statutes relating to *feme sole* traders do not enable a married woman to incur an obligation as surety,

if not being shown to be necessary to the prosecution of her separate business or profession.

A husband is liable for the reasonable funeral expenses of his wife, whether or not she may have had property of her own.

Agency.

A married woman may become the agent of her husband either by express authority or by implication of law. A husband may appoint his wife as his agent either orally or in writing, as by a power of attorney. The wife's implied agency for her husband may be inferred from his acts and conduct toward her. The law will imply that the wife is acting as her husband's agent when she is left in charge of his property during his absence; the implied agency of the wife to bind the husband for necessities was considered in the previous article. A wife, while acting within the scope of her express or implied agency, binds her husband by her acts. The Supreme Court of Pennsylvania has qualified this rule somewhat, holding that a husband is bound by the acts of his wife done in relation to his property during his absence, unless within a reasonable time he disavows her acts. A married woman, acting as her husband's agent, may sell, mortgage, hire or otherwise dispose of his real or personal property or may sign receipts for rent. Unless acting as her husband's agent, a married woman has no authority to make or rescind any contract in his name or to dispose of his property. She cannot lease his lands or give a license to enter upon the same, nor has she any implied authority to draw his money from a savings bank.

A wife, intrusted by her husband with the ordinary business of a tavern, cannot bind him by a contract to give board for less than the usual rate. Likewise, where a husband permitted his wife to carry on a business in his name, and to draw in his name checks and notes to be used in the course of business, she had no power to make him liable as surety for loans to third persons or on mere accommodation paper. A wife cannot bind her husband for goods purchased for her daughter by a former marriage, with directions to charge them to herself, and send them to her daughter residing away from home, and even a promise of the husband to pay therefor, without any new consideration, is not binding.

Conversely, a husband has no power to bind his wife without showing express appointment as her agent, or unless there are such acts as clearly establish by implication his agency.

As a general rule of law a husband and wife cannot enter into a valid contract, as in the eyes of the law they are regarded as one, but equity will in many instances recognize and enforce the same, if reasonable and not prejudicial to third persons. For many purposes Courts of Equity treat husband and wife as distinct persons, recognizing their ability to contract mutually. It has been held that a married woman who lends money to a partnership of which her husband is a member cannot recover it in equity, or in law, for she cannot contract with nor sue her husband. This matter is regulated in many States by statute.

Where husband and wife are prohibited from entering into a valid contract, they frequently do so indirectly by means of the intervention of a third person or trustee. The object of the Pennsylvania act of April 15, 1851, contemplating the intervention of a trustee where a wife loans money to her husband, is to protect the wife and not to render loans made by her to her husband in good faith void. In equity, independent of statute, a gift of personal property from a husband to his wife will be upheld, if fair and reasonable, provided the rights of creditors are not prejudiced thereby.

It has been held that a husband cannot be indicted for slandering his wife, but either husband or wife may be indicted for an assault and battery upon the other. As a general rule, a husband and wife cannot sue the other in tort, but either may have the other arrested for a crime.

A married woman cannot in Pennsylvania become an incorporator of a corporation, except it be a charitable one. She may, of course, own shares in any business corporation.

Neither the wife's equitable nor statutory separate estate is liable for the debts of her husband.

It will be unnecessary to discuss the respective rights of a husband and wife in the estate of the other after death, as the subject of dower, curtesy and the descent of property has heretofore been treated.

Rights and Liabilities of Survivor.

Upon the death of the wife intestate the husband is entitled to obtain letters of administration on her estate. The wife's separate estate shall be liable for debts contracted upon the faith of it, but the husband is liable as administrator on the estate of his wife for her debts, only to the extent of the assets thus received by him. A husband on the death of his wife becomes tenant by the curtesy of his wife's real estate, which means that

the husband has a freehold estate therein for the term of his natural life. Of course if the wife has made a will, the husband must elect whether to take under the provisions thereof or by virtue of his right as tenant by the curtesy.

When marriage is dissolved by the death of the husband, the widow is entitled to administer upon his estate. The common law obligation of the widow to bury her deceased husband rests upon weaker foundations than the corresponding obligation of the husband. If the husband's estate is sufficient it ought to bear the expenses of his burial. As to the possession of the dead body of the husband for preservation and burial, the surviving wife is treated with the same paramount consideration as against strangers and even the next of kin which a surviving husband receives. A woman who has paid the expenses of her late husband's final illness and funeral from her separate property may charge the same against his estate. As a matter of fact, in Pennsylvania where married women are liable on their contracts for articles necessary for the support of the family, a married woman is held liable on her contract for the funeral expenses of a mother who lived in the household and died without means. Upon the death of her husband, a widow is entitled to her dower in his estate. If he made a will she may elect to take thereunder, or she may take her statutory or common law dower, the nature of which estate we have heretofore considered. Where husband and wife die at the same time, or practically so, and personal property is found in one receptacle, to which both had access, and there is nothing to show how much each contributed to the fund, a Court of law will consider it as owned by them in equal shares.

Parent and Child.

The most universal relation in nature according to Blackstone is that of parent and child. Natural law and the precepts of revealed religion demand the preservation of this relation in its full strength and purity. Children are a common object of affection to the parents and draw closer the ties of their mutual love; a child's education is a matter of the parents' common care, which further identifies their sympathies and objects.

The term "parent" signifies the immediate father or mother of a child, and a person is said to be *in loco parentis* when he or she is invested with the rights and charged with the duties of a parent. Children are divided into two classes, legitimate and illegitimate. A legitimate child is one born in lawful wedlock or is

properly brought within the influence of a valid marriage by reason of the time of birth. In other words, a child to be legitimate must be born in a manner approved of by the law. If a child is begotten before marriage, but is born during lawful wedlock, it is legitimate, as would also be the case if begotten in lawful wedlock, but born afterward. A ceremonial marriage is not necessary. A common law marriage may be established by cohabitation and reputation, and children born therein are legitimate. The law raises the strongest presumption of the legitimacy of all children and the burden of proving illegitimacy is upon them who assert it.

The citizenship, residence or domicile of a child is that of its parent, father, if living at time of birth; a child until it reaches its majority cannot change its domicile from that of its parents.

The relation of parent and child may be created in two ways—(1) naturally, and (2) by adoption. A natural child is a child born in lawful wedlock. Adoption is the taking or choosing of another's child as one's own. The method of adoption in the various States is pointed out by local law, which usually provides that under a judicial decree rendered upon due investigation, any person may adopt as his own the child of others, who shall be deemed, for the purpose of inheritance and all other legal consequences and incidents of the natural relation of parent and child, the child of the parents by adoption, the same as if born to them in lawful wedlock.

In Pennsylvania the adoption of children is regulated by the act of May 19, 1887, which provides that any person desirous of adopting any child as his or her heir may present a petition to Court averring such intention, and that he or she will perform all the duties of a parent to such child. The Court, if satisfied that the welfare of the child will be promoted by such adoption, may, with the consent of the parents or surviving parent of such child, or if the father or mother from drunkenness, profligacy, or other cause shall have neglected or refused to provide for such child for the period of one year, with the consent of the non-neglecting father or mother alone, or if none, the guardians or overseers of the poor, or of such charitable institution as shall have supported such child for at least one year, decree that such child shall assume the name of the adopting parent and enjoy all the rights and be subject to all the duties of a child. Such a child is entitled to inherit from the adopting parent, but the personal estate of an adopted child who dies intestate (without having made a will) goes to the natural parent instead of to the adopted

parent. No relation exists between a widow and her deceased husband's adopted child.

The law imposes three duties on parents toward their children—(a) their protection, (b) education and (c) maintenance.

So far as protection is concerned, Nature works so strongly as to need a check rather than a spur. The law holds that a parent may justify an assault and battery in defense of his children. The parent should protect a child from all evil and injury and may maintain and uphold his children in their lawsuits without being guilty of the legal crime of maintaining quarrels.

A parent is bound to educate and maintain an infant child; and if another person performs this natural duty for the parent with knowledge and consent the parent would be liable to pay a reasonable sum to such person. Under the public school system of Pennsylvania the State relieves the parent of this duty. The duty of education imposed upon a parent does not extend to providing a child with a trade or profession. Over the religious discipline and instruction of children Courts have no jurisdiction. However, law deals only with the civil rights and duties belonging to the relation of parent and child. In fact, the Supreme Court of Pennsylvania has decided that a father has no authority to control or interfere with the rights or conscience of his minor child, who has arrived at the age of discretion. The same Court has further decided that although a father cannot compel his child against the child's conviction of right to become a member of any particular religious denomination, he may lawfully restrain the child from violating the religious obligations which it has taken.

Maintenance is that support which one person gives to another for his living, and the obligation for maintenance on the part of a parent extends until the child is in a condition to provide for itself and merely includes necessary support. A father is under no legal obligation to support an adult widowed daughter or her infant offspring. The law does not compel a father to maintain his idle and lazy children in ease and indolence, but he may require them to work and is entitled to their wages until they reach their majority.

In view of the fact that parents are bound to the performance of certain duties toward their children, they are vested by law with certain authority over them. With the progress of refinement a parent's authority over the person of a child has been much relaxed, and obedience is enforced more by kindness than severity. A Court of law is reluctant to interfere in matters of family discipline and will discountenance every species of cruelty

which goes by the name of parental rule. The right of moderate chastisement is given every parent, such being for the benefit of the child's education; but a parent must not exceed the bounds of moderation and inflict cruel and merciless punishment. For example, where a father put his child, a blind and helpless boy, in a cold and damp cellar without fire during several days in mid-winter, he was held subject to indictment and punishment for such cruel treatment. A parent who suffers his child to starve to death is guilty of murder. A child's tenderness of age and helplessness are elements in such cases, and when children grow up they are presumed to provide for their urgent wants.

The father, and on his death the mother, is generally entitled to the custody of infant children, inasmuch as they are their natural protectors for maintenance and education. It may be stated as a general rule that the father is entitled to the custody of his legitimate children, to the exclusion of their mother, though they be within the age of nurture. If the child be of an age to exercise choice, a Court will leave him to elect where he will go; if not, he goes to the father, unless he had abused the right to the custody of his child, or there be an apprehension of cruelty or some exhibition of gross profligacy or want of ability to provide for his children. But if the parents live in a state of separation without being divorced, and without the fault of the wife, the courts may, on application of the mother, award the custody of the child to her.

A parent will not be allowed to divest himself of the custody of a child, it being placed upon him by law, not for his gratification, but on account of his duties. Contracts for the surrender of the care and custody of children are held to be against public policy and no bar to the parent in an attempt to regain such custody. It sometimes happens, however, that parents have abandoned their minor children, or by act and word have transferred their custody to another. In such cases where the custodian is in every way a proper person to have the care, training and education of the infant, and the Court is satisfied that its social, moral and educational interests will be best promoted by remaining in the custody of the person to whom it was transferred or received when abandoned, the new custody will be treated as lawful and exclusive. After the affections of both child and adopted parent become engaged and a state of things has arisen which cannot be altered without risking the happiness of the child, and the father wants to reclaim it, the better opinion is that he is not in a position to have the interference of the Court

in his favor. His parental rights must yield to the feelings, interests and rights of other parties acquired by his consent.

Right to Child's Services and Earnings.

Blackstone says that the father should have the benefit of his children's labor while they live with him and are maintained by him. This right, the same as that of custody, is based upon the parental duty of maintenance and furnishes compensation to the father for his own services rendered the child. This is certainly true of the father, and the better opinion gives the same right to the mother after the death of the father, especially where the child is supported by her. In certain cases this right of services extends to adult children. For instance, after attaining majority, the child may elect to remain with the father as his servant, and be supported by him, or may be incapable of emancipation by reason of imbecility, and if in such case he continues to live with the father, the latter will be liable for the child's support and entitled to receive his wages.

A parent can maintain an action for services against a corporation which knowingly hires and keeps in its employ a minor child of such parent against the latter's will. The question whether a minor over eighteen years of age may enlist in the military service of the United States without the consent of his parent or guardian seems to be unsettled. It has been held that where a man enticed away the minor son of another, against the father's consent, and placed him in the United States Army, that he was liable for the value of his son's services during the whole period of his absence as a soldier.

A parent has no title to the property of a child nor is the capacity of the latter to take property or receive money by grant, gift or otherwise, except as a compensation for services, in any degree qualified or limited during minority. Whatever, therefore, an infant acquires which does not come to him as a compensation for services rendered belongs absolutely to him, and his father cannot interpose any claim to it, either as against the child or as against third persons who claim title or possession from or under the infant. The law vests no authority in a parent to manage or control a child's property, unless formally appointed as guardian by a Court of competent jurisdiction, and it is well to bear in mind that a Court will seldom appoint a parent guardian of a child's property.

Gifts between parents and children are valid unless prej-

udicial to the creditors of the party making the gift. A father can settle property in trust upon his children the same as he may upon his wife. Gifts from a child to a parent, especially when made just after attaining majority or while still under the parental control and authority, are looked upon by the law with suspicion, and the parent is required to show that they were the spontaneous acts of the child with a full understanding of his rights and position, or equity will set them aside. Gifts between parents and children are ordinarily supported upon the consideration of natural love and affection.

In transactions between members of the same family, even though that relation subsists between them from whence a Court will infer the moral certainty of considerable influence and the probability of its having been exercised, yet if the transaction be one that tends to the peace or security of the family, to the avoiding of family disputes and litigation, or to the preservation of the family property, the principles by which such transactions must be tried are not those applicable to dealings between strangers, but such as on the most comprehensive experience have been found to be best for the interest of families.

Rights and Liabilities in Tort.

If a minor child is injured through the negligence or malfeasance of another, the parent cannot recover for the injury as such, this right belonging solely to the child, however, the father may recover for the loss to himself caused by the injury, which will be measured by the loss of the child's services during minority, if a permanent injury; otherwise until recovery, and by the expenses of the illness caused by the injury. On the death of the father the mother succeeds to his rights. Any one, in fact, standing in *loco parentis* to the child may recover for an injury to the child on the same principles.

In regard to the liability of a parent for injuries done to third persons by a minor child, it may be stated as a general principle of law that a father is not liable for the torts of his minor children. This rule does not apply, however, to cases where the tort is committed by the child while engaged in performing work directed by the father; where a child is engaged in the father's service and in doing work authorized or commanded by him, he is responsible for loss resulting to others from the negligence of the child, and it has been held that where a father permits his young children to do upon his premises acts which are likely to

cause injury to passers-by, he is responsible for the injuries so resulting, although he did not by express words authorize or direct the acts. But a parent cannot be held liable for the wilful trespasses and torts of his infant children when he neither assents to nor ratifies them. In other words, a parent incurs no responsibility for the acts of minor children if he can prove that he was unable to prevent the acts which give rise to the liability.

Rights and Duties of Children.

The duties which are enjoined upon children to the parents are obedience and assistance during their own minority and gratitude and reverence during the remainder of their lives. Disobedience to parents was punished under the Jewish law with death (Deut., xxii, 18) and with the Hindoos it was attended with the loss of the child's inheritance. The classical scholar cannot be at a loss to recollect how assiduously the ancient Greeks provided for the exercise of filial gratitude. Solon ordered all persons who refused to make due provisions for their parents to be punished with infamy, and the same penalty was incurred for personal violence toward them. No one can read "King Lear" without recognizing the sublimity of an unquestioning faith in this moral duty.

A child has no absolute right of inheritance from the parents. In most of the United States statutes have been passed providing for the maintenance of indigent parents by their children, but this obligation can only be enforced in the mode pointed out by statute.

Emancipation.

It is possible in law for a minor child to become freed from parental control by becoming what is called "emancipated." Emancipation means the release of a child from the obligations due a parent, and is not a right enforceable by the child, but a privilege given by the parent. So far as the general public is concerned, the emancipation of a minor by its parent does not give the minor the right to enter into valid contracts, but it gives the child the right to its own wages or earnings. Emancipation may be accomplished either by entering into a written agreement or it may be inferred from the conduct of the parent in permitting the child to use his time as though he were emancipated. If a parent deserts or abandons a child, the child is released from all filial duties which the law will enforce, and may seek his own

welfare in his own way. The marriage of a minor child with the consent of a parent operates as an emancipation, giving the minor child the right to apply his earnings to the support of his own family.

Advancements.

A father sometimes gives to a child an advancement on its distributive share in his estate. Whether gifts made to a child during the lifetime of a father are to be regarded as an advancement is a question of intention. Small and inconsiderate sums of money given a child for current expenses, ornament or education are not to be regarded as advancements. Loans of considerable importance to a son, annuities and large sums advanced for a trade or profession are usually regarded as advancements, which, upon the death of the father and the distribution of his estate, are to be deducted from the share of the child who received the advancement.

The authorities are uniform to the effect that a person is not entitled to the custody and earnings of stepchildren nor bound by law to maintain them. However, if a stepfather voluntarily assumes the care and protection of a stepchild he stands *in loco parentis* for the time being.

In concluding the subject of parent and child we will inquire into the authority whereby children may be taken from their parents and committed to penal and charitable institutions. The law regulating this matter is entirely statutory. The principles involved in the construction of such statutes are founded on familiar principles of law and have enabled the Courts to enlarge the scope of these institutions. Where the commitment of a minor is for a distinct criminal offense he is entitled to all the regular formalities of criminal procedure, and statutes authorizing the summary commitment of minor criminals without a trial by jury have been held unconstitutional. Where, however, the minor has committed no criminal offense, the State has authority to commit to a child-saving institution by summary procedure any child who, destitute of parental care, seems likely to grow up to be a charge upon the State, either as a criminal or as a pauper.

House of Correction—Refuge—Huntingdon Reformatory.

In Pennsylvania, under the act of June 2, 1871, minors not under sixteen years of age, absenting themselves from school, or who shall disobey their parents' commands or be found idle in the streets, may be arrested upon the complaint of the parents of

said minor, or upon the complaint of any citizen, and may upon a hearing be committed to the House of Correction. In the case of a boy, the time of commitment must not exceed his majority, and in the case of a girl must not be for a period beyond the age of eighteen. All children not under the age of sixteen years, deserting their homes without good and sufficient cause, or keeping company with dissolute or vicious persons, against the lawful commands of their fathers, mothers or guardians or other person standing in the place of a parent, shall be deemed disorderly children.

In Philadelphia children convicted of criminal offenses or guilty of incorrigible or vicious conduct may be committed to the House of Refuge. The House of Refuge is not a prison, but a school. The object of the charity is reformation by training its inmates to industry, by imbuing their minds with the principles of morality and religion, by furnishing them with the means of earning a living; and, above all, by separating them from the corrupting influence of improper associates. To this end the natural parents, when unequal to the task of education or unworthy of it, are superseded by the *parens patriæ* or common guardian of the community, the State.

Under the act of April 28, 1887, any male criminal between the age of eighteen and twenty-five, and not known to have been previously convicted of crime, may be committed to the Huntingdon Reformatory.

Juvenile Court.

The act of April 23, 1903, vested in the Courts of Quarter Sessions of the Peace in the respective counties of Pennsylvania jurisdiction in all proceedings which may be brought before them affecting the treatment and control of dependent, neglected, incorrigible and delinquent children under the age of sixteen years. Any citizen may petition the Court, setting forth that a child is neglected, dependent or delinquent and is in need of the protection of the Court. The Court has power to appoint discreet persons of good character to serve as probation officers during the pleasure of the Court, without compensation, such officers to make such investigations as the Court may direct. Upon the hearing of any charge against a juvenile, the Court, considering the best interest of the State and the child's own good, may commit said child to the care of its parents, subject to the supervision of a probation officer, or to some suitable institution, or to the care

of some reputable citizen of good moral character, or to the care of some training or industrial school.

The act above referred to makes it unlawful to hold, pending a hearing, a juvenile in confinement in any county or other jail, police station or in any institution to which adult convicts are sentenced. The County Commissioners in each county of this Commonwealth are required to provide a separate room or rooms or a suitable building to be used exclusively for the confinement of children under sixteen years of age, awaiting trial or hearing in any of the Courts of the county.

It is the object of the law to train and discipline children to become useful and law-abiding citizens, and to protect them from contaminating influences and the indiscretions incident to their tender years. With this end in view statutes have been passed forbidding the sale of intoxicating liquor and cigarettes to minors. As a further illustration of the watchful eye exercised by the law over minor children, the act of April 18, 1905, provides that any licensed keeper, proprietor, owner or superintendent of any public pool room, billiard room, bowling saloon or ten-pin alley who shall allow or permit any person under the age of eighteen years to be present therein, shall be guilty of a misdemeanor, and upon conviction thereof be punished by fine of not less than ten dollars nor more than one hundred dollars.

Having concluded the subject of parent and child, it is appropriate that we consider next the relation of guardian and ward, particularly in view of the fact that the latter is so closely allied to the former.

Guardian and Ward.

A guardian has been defined as one who legally has the care and management of a person or the estate or both of a child during minority. A ward is one whose person or property, or both, are under the care of a guardian. The relation of guardian and ward may exist during the lives of the parents, if the infant becomes vested with property, but it usually takes place on the death of the father, and the guardian is intended to supply his place. But to give the clearest conception of the status of a guardian, the following definition is perhaps the most complete: "A guardian is a person lawfully invested with the power and charged with the duty of taking care of the person and managing the property and rights of another person, who for some peculiarity, or defect of age, understanding or self-control, is considered

incapable of administering his own affairs." From this definition it will be observed that guardianship applies to idiots, lunatics, spendthrifts and the like, the same as to minor children.

According to the classification given by Chancellor Kent in his *American Commentaries*, there are two kinds of guardianship—one by the common law and the other by statute. There were three kinds of guardian by common law—(a) guardian by nature, (b) guardian by nurture and (c) guardian by socage.

Guardianship by nature at common law, according to the early English authorities, was the right of the father, mother, next of kin, in the order named, to the custody of the person of the heir apparent. In America, at the present day, the term "guardian by nature" is applied to all the incidents of the common law guardianship by nature, with the exception that it is not confined to the heir apparent, and the authorities in this country hold that a father, and on his decease the mother, is guardian by nature of the child. After their death the paternal grandfather or next of kin is the infant's guardian by nature. This species of guardianship extends only to the custody of the person of the ward and not to his property, either personal or real. Guardianship by nurture never existed in the United States; in England it was the right only of the father or mother to the custody of the person of an infant, not the heir apparent, who was without any other guardian. It ended when the ward reached the age of fourteen, and extended only to the care of the person and education of the infant, no right to the control of the property of the ward vesting in a guardian of this class.

Guardianship in Socage.

Guardianship in socage at common law arose whenever an infant under fourteen years of age acquired title to real estate, the chief object of this trust, according to Blackstone, being the protection of such property and the instruction of the young heir in the pursuit of agriculture. Those who followed the treatise on feudal tenures, under the subject of real estate, appearing in another chapter, will better understand this species of guardianship. It applies only when the infant inherits land and cannot exist if his estate be merely personal. It was necessary that the heir's title must have been legal, not equitable. These guardians in socage cease when the child arrives at the age of fourteen years, for he is then entitled to elect his own guardian and compel an accounting of the rents and profits

received until that time. Guardianship by socage only exists to-day in a limited degree as to certain features.

The second, and by far more important, division of guardians is statutory. At common law a father has no right to appoint a testamentary guardian for his child. This right was given by the Statute of 12 Chas. II, c. 24, by the terms of which the father by his last will and testament or by deed might appoint a guardian for his infant child until he was of full age. This statute has been adopted, or substantially so, in practically every State of the Union.

A testamentary guardian cannot transfer the custody of the ward by deed or will to any other person, the trust being personal. The infant ward cannot compel an accounting until majority is reached. This kind of guardianship covers the person as well as estate. If the ward be a girl her marriage terminates a testamentary guardianship.

In Pennsylvania a substitute for the eighth section of the act of 12 Chas. II is found in the fourth section of the act of April 8, 1833, which, after defining the power of making a will, enacts that "Every person competent to make a will, being the father of any minor child unmarried, may devise the custody of such child during his or her minority or for any shorter period." The sixth section of the act of May 4, 1855, qualifies the power thus conferred by saying that no father who shall have for one year or upward previous to his death wilfully neglected or refused to provide for his child or children, shall have the right to appoint any testamentary guardian of him, her or them during minority. The father of an illegitimate child has no power to appoint its guardian, nor may a grandfather appoint by will a guardian for the grandchild, child of his son or daughter, unless such son or daughter, if living, receives and accepts a benefit from the will. The right of custody bestowed by the father's will will prevail against that of the child's own mother; although a testamentary guardian does not owe his appointment to a Court, he is subject to removal for cause by it.

By the terms of the first section of the act of June 10, 1881, it is provided that every mother of an unmarried minor child who shall leave to such child an estate may appoint a testamentary guardian for such child, provided that the father be not living, or, being deceased, he has not appointed a guardian. It will be interesting to many to know that under the act of May 25, 1887, whenever any husband, from drunkenness, profligacy or

any other cause, has neglected or refused to provide for his wife and children, or has deserted them, such wife may, if she leave to her children an estate, appoint a testamentary guardian. Owing to a popular misapprehension upon the matter, it is well to bear in mind that a testamentary guardian cannot be superseded by the selection of the child on its reaching the age of fourteen. Upon cause shown the Orphans' Court may require a testamentary guardian to give security for the ward's protection.

The last class of guardians are guardians *ad litem*, being a guardian chosen to represent the ward in legal proceedings. He has no power to bind the infant by anything further than the ordinary proceedings of the suit.

Our courts of law are vested with authority by statute to appoint guardians for the protection of persons legally incompetent to control themselves or their property. Two important elements enter into the jurisdiction of the Court to appoint a guardian. The ward must be a resident within the jurisdiction of the Court, and the property possessed by him must be located therein. Sometimes where the ward is a non-resident a guardian is frequently appointed for the collection and preservation of the ward's estate located within the jurisdiction.

Where the husband is an infant the wife's estate devolves upon the guardian of her husband and the appointment of a guardian for the wife is a nullity. Of course, a guardian cannot be appointed for a minor whose natural protector is living, as, for instance, the adult husband of an infant wife. It has been held that a guardian may be appointed for an infant whose parents have abandoned him, or for an infant who by statutory proceedings has been taken from its parents and placed in the custody of a person selected by the Court.

In Pennsylvania the fifth section of the act of March 29, 1832, gives the Orphans' Court of each county care of the persons of minors resident within such county and of their estates, and are given power to admit such minors when and as often as there shall be occasion, to make choice of guardians, and to appoint guardians for such as they shall judge too young or otherwise incompetent to make choice for themselves. An important proviso of this act is that persons of the same religious persuasion as the parents of the minors shall in all cases be preferred by the Court in their appointment, and such appointment or admission of a guardian by the Orphans' Court of the county in which the minor resides shall have the like effect in every other county

of this Commonwealth as in that by the Orphans' Court of which he shall have been so admitted or appointed.

Who may be Appointed Guardians.

It is a well-settled rule of law that in the appointment of a guardian the interest of the minor is the paramount consideration. A Court will take into consideration not merely temporary welfare, but the state of the minor's affections, attachments, his training, education and morals. The guardian's trust is one of obligation and duty, and not of speculation and profit. He cannot reap any benefit in any contract or purchase, or sell, as to the subject of the trust. If he settle a debt upon beneficial terms, or purchase it at a discount, the advantage is to accrue entirely to the infant's benefit. Consequently an important qualification of a guardian is personal disinterestedness and absolute freedom from social or financial obligations antagonistic to the financial interests of his ward. Such opposing influences have a tendency to divide and weaken the strict loyalty which the law demands of a guardian towards his ward.

A partnership cannot be appointed a guardian, nor can a corporation unless specially authorized to do so by its charter.

When vacancies occur in a guardianship, by the death of the guardian, a second may, and properly should be appointed if the minority still continues. If a guardian resign, or his appointment be revoked, the Orphans' Court may appoint a successor. Where the duration of the guardianship has expired, the guardian must render a strict accounting of his trust, the guardianship terminating on the arrival of the ward at majority, except for the purpose of a final accounting and settlement with the ward. As a matter of fact, while the guardian's trust expires on the ward's reaching majority, the responsibility of his relation may continue, as, for instance, where he has not made his final account with the ward, or where the guardian incurs a personal responsibility on a contract made by his ward in pursuance of an express authority.

The Orphans' Court has power to remove any guardian for mismanagement of the estate, or misconduct as to the care of the person of the ward. The Supreme Court of Pennsylvania has held that where the management of the trust property has been adverse to the interests of the minor, and a feeling of hostility has been engendered, which may prove embarrassing and injurious to all parties, a petition for the removal of the guardian will be granted.

Particular Rights and Duties of Guardians.

Having considered briefly the nature of guardianship, how created and terminated, it will be instructive to point out a few of the particular rights and duties appertaining to this relationship. Every general guardian, whether testamentary or appointed, is bound to keep safely the real and personal estate and the issues and profits of the real estate, and if he suffers any waste, sale or destruction of the inheritance he is liable to be removed and to answer in treble damages. If the guardian has been guilty of negligence in the keeping or disposition of the infant's money, whereby the estate has incurred loss, the guardian will be obliged to sustain that loss.

The ninth section of the act of March 29, 1832, provides that "Every guardian shall, within thirty days after any property of his ward shall have come into his hands or possession, file in the office of the clerk of the Orphans' Court a just and true inventory and statement, on oath or affirmation, of all such property or estate. No appraisement is required by the act of Assembly, but it is usual for the guardian to affix to the names or descriptions of the articles in the inventory estimates of their value in money.

In Pennsylvania the law requires every guardian, whether required by the Court to give security or not, at least once in every three years, and at any other time when directed by the Court, to render an account of the management of the minor's property under his care, and on the arrival of the ward at full age settle in the Register's office a full and complete account of his guardianship, including all the items embraced in each partial settlement. Although the filing of triennial accounts is frequently neglected by guardians, failure in this regard is cause for dismissal should the question be raised.

If the guardianship cover the person of the ward it is the duty of the guardian to protect, educate and maintain the ward. The guardian has not the same right as a father to the personal services of the infant, the guardian's duty to educate and maintain being limited by law to the ward's resources, and is not like the responsibility of a parent absolute. The guardian in considering what are necessities for the ward is not to consider the style of life to which the ward was accustomed, but rather the income of the ward's estate at the guardian's disposal.

A guardian has no right to convert the personal estate of an infant into real estate, or buy land with the ward's money without

applying to the Court for authority. The power resides in the Court to change the property of infants from real into personal and from personal into real whenever it appears to be manifestly for the infant's benefit.

It is a duty of a guardian to invest such funds as are under his control, and if same be more than sufficient for the purposes of the trust, upon application to Court the right may be granted to invest such funds in the stocks or public debts of the United States or in the public debt of any State, or in ground rents, other real estate and real securities. A guardian cannot invest a ward's money in the stocks and bonds of any private corporation without rendering himself liable to be surcharged for any loss occurring. A guardian is entitled to expenses and compensation covering his services.

Master and Servant.

The last relation in domestic life which remains to be examined is that of Master and Servant, the law regulating which has been developed from the time when the vast majority of human beings were slaves.

Definition.

The term "master," in its legal significance, means one who has the superior choice, control and direction of the servant, and whose will the servant represents not merely in the ultimate result of the work, but in the details. In other words, a master is one who exercises personal authority over another, and that other is his servant.

A servant, strictly speaking, is a person who by contract or operation of law is for a limited period subject to the authority or control of another person in a particular trade, business or occupation. In law it embraces all persons of whatever rank or position who are in the employ and subject to the direction or control of another in any department of labor or business. As a matter of fact the term "servant" may be used as synonymous with employee.

At common law servants were divided into three classes: Menial servants, apprentices and agricultural laborers and agents. All persons who were engaged in the master's family in general household duties, or who performed menial services under the immediate supervision or control of the master, connected with his household and lodging therein or living within the curtilage,

were regarded as menial servants, and as such, although hired for a year, might be dismissed at any time upon a month's notice or payment of a month's wages. A governess engaged at a yearly salary, although performing her duties in the master's household, did not come within the rule relating to menial servants. Apprentices are those servants who are under special contract to learn a trade, during which they are under the control and supervision of a master. A third species of servants are laborers who are only hired by the day or week and do not live as part of the family. There is yet a fourth species of servants, if they may be so called, being rather in a superior capacity, such as stewards, factors and bailiffs, whom, however, the law considers as servants *pro tem.* with regard to such of their acts as affect their master's or employer's property. In Pennsylvania, and a majority of the other States of the Union, the distinction between the various classes of servants is of little importance, and all who are in the employ of another, in whatever capacity, are regarded in law as servants, whatever may be the social distinction. Thus it has been held that a detective employed by a railroad company is its servant, and likewise a civil engineer employed by a railroad company at a fixed salary and subject in his duties to the company's orders, is a servant of the company within a statute declaring stockholders liable for debts to laborers and servants.

Where in a will property is left to the testator's servants, it is well settled that the word "servants" includes only those that are employed in and immediately around the homestead of the deviser. It has been held that the term "servants" whose wages were by a legislative act to be paid out of an intestate's estate in the same rank with funeral expenses, embraced those only who in common parlance were domestics, persons who made part of a man's family, and whose business it is to assist in the economy of the family or in matters connected with it, and that it did not comprehend workmen, employed at iron works and the like.

The law makes a separate classification of public servants, or those whose functions appertain to the administration of government, but which having no bearing on domestic relations, we will dismiss from our consideration for the present.

Formation of Relation.

The relation of master and servant arises out of a contract between the master on the one hand and the servant on the other. Therefore, to create the relation both parties must be capable of

contracting and neither be under any legal disability which prevents mutuality. An agreed understanding is not essential to create the relation, it may be implied from circumstances; as where the master induces the belief that a certain person is his servant and thereby leads another to act upon such belief to his injury. The relation exists where one person is willing to work for another from day to day and that other desires the labor and makes his business arrangements accordingly.

A contract for services made with a minor is not invalid simply because it is not entered into with the parent or guardian; it is only voidable at the election of the parent or guardian. Employment of a minor without the parent's consent will in the absence of other evidence be presumed to be against the parent's will; but some Courts have refused to recognize this presumption. As a general principle one may be said to hire and pay a minor at his peril. If he fails to ascertain the status of the child he must take what consequences may arise. But where a minor absconds from his father's house, and enters the service of one, who, for his labor, furnishes the infant a reasonable support, the father can only recover in an action against the employer the value of the services rendered less the worth of the necessities supplied.

A contract of employment, whether written or verbal, may contain such terms and conditions as the parties see fit to make, provided they are not illegal and do not contravene public policy. Upon the consummation of the contract the one is bound to render the service and the other to pay the stipulated consideration.

Where there is no express contract between an employer and an employee, imposing on the latter a higher degree of skill, care, diligence and attention to the discharge of the duties of the position he contracts to fill, only the ordinary and reasonable skill, care, diligence and attention implied by law can be required of him. But if the employee contracts for a higher degree of skill than the law implies, he cannot excuse himself from a failure to live up to his contract, by merely showing that he performed the duties of his position with the ordinary and reasonable degree of skill and care required of him by law.

A servant is presumed to have been hired for such a length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate for one day; a hiring by piecework for no specified time. If a written contract of employment is entered into, little

difficulty arises, but the vast majority of contracts establishing the relation of master and servant are merely oral, and hence in determining the rights of the parties we are compelled to rely on certain customs or usages and legal presumption. Where one was under monthly employment, and told his employer that he wished it more permanent, and an amount per year was agreed upon, payable semi-annually, a hiring for a year may be inferred. A hiring for personal services, for which payment is made quarterly, is not necessarily a hiring by the quarter or terminable by a quarter's notice.

If a servant is hired for a definite time and leaves the service before the end of it, without reasonable cause, or is dismissed for such misconduct as justifies it, he loses his right to wages for the period he has served. A servant so hired may be dismissed by the master before the expiration of the term either for immoral conduct, wilful disobedience or habitual neglect. If the master wrongfully discharges his servant, he is liable to an action for damages and the servant may recover for loss of wages caused thereby during such time as he was compelled to remain idle. If a party contracts to render his services for a specified time and before the expiration thereof leaves, no action will lie against his employer unless such absence is caused through sickness or inevitable accident or by his employer. In Pennsylvania the right of a master to correct or chastise his servants is expressly denied.

A general or indefinite hiring is presumed to be a hiring at will. Employment by the year or at a yearly salary is not changed to a quarterly, monthly or weekly hiring by the fact that the payments are to be made quarterly, monthly or weekly. The Courts of New Jersey have held that the reservation of wages payable monthly or weekly will not control the contract so as to destroy its entirety when the parties have expressly agreed for a specified term, as for a year. But if the payment of monthly or weekly wages is the only circumstance from which a duration of the contract is to be inferred, it will be taken to be hiring for a month or for a week.

If after the expiration of a contract of employment the service be continued, it will be presumed that the same is done upon the same terms and conditions as contained in the original contract.

If a master unjustly discharges a servant, or, having agreed to employ him, repudiates the contract before the commencement of the services, it is the duty of the servant to use reasonable

care and diligence in entering into other employment of the same kind and thus reduce the damages. It has been held that whatever would be a good reason for discharging a servant would be an equally good reason for refusing to take him into the employer's service after having engaged to do so. It is, however, no defense to a contract to employ that at a time subsequent to the alleged contract the master had employees enough to do all his business.

Implied Contracts of Hiring.

In default of a contract of hiring a person may recover compensation for services where the same were rendered under such circumstances as to show that he looks to be paid as a matter of right, and such that the person for whom they were rendered was bound to know that he claimed compensation therefor or was legally entitled thereto. It is well settled that if one man labors for another, or renders him service in his business, and that other, knowing all the facts, stands by and sees what is done, and makes no objection, he is estopped to deny that such services were rendered at his request. Where one requests another to perform services for him, and no provision is made for compensation, the law implies a promise to pay what they are reasonably worth. The law does not imply a contract to pay for services between members of a family, unless such was the expectation of the parties concerned. The family relation necessary to rebut the presumption of a contract may exist between grandparents and grandchildren, also between a father or mother-in-law and son-in-law, or uncle and niece by marriage. A stepfather who receives his stepchildren into his family stand *in loco parentis* to them, and in default of an agreement no presumption will arise that he is under obligations to pay them for services rendered by them. The relationship of brother and sister does not overcome the legal presumption that a promise to pay is intended when personal services are rendered. Neither can a guest ordinarily recover for services rendered while in the home of another. Where a woman of twenty-five years of age lives for six years with her stepmother, from whom her father had been divorced, working as a dressmaker, and was in the habit of giving some of her earnings to her stepmother and doing some of the household work, the Court refused to allow her to recover wages from her stepmother for services rendered.

Where by contract one is employed by another to do work

by the day or month or year, and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day, month or year, as the case may be. If a merchant employs a clerk, and, pending his term of service the merchant forms a partnership in the same character of business, and the clerk enters the service of the firm, the contract with the original employer as an individual is at an end. Contracts of employment by the firm have been held to be conditional on the firm not being dissolved by death, and in case of the death of a partner the survivor is not obliged to carry out the contract. But the fact that employers who have agreed to hire an employee for a year and pay him a certain salary become insolvent and are obliged to cease business, and notify the employee that his services will not be required thereafter, does not absolve them from their obligation to pay according to the terms of the agreement.

In case a master notifies his servant that he will thereafter pay him less, and the servant continues work without notifying his master that he will claim more, a new arrangement is made which becomes binding on both.

Statutory Regulations.

The State may, in the exercise of its police powers, impose such regulations and restrictions upon the relation of master and servant as are conducive to the public welfare, health, safety or morals. For example, statutes have been passed prohibiting the coercing of an employee by a threat to discharge him because of his connection with a labor organization. Statutes establishing an eight-hour labor day for certain industries have also been held constitutional.

Termination of Contract.

The authorities are somewhat conflicting as to the rule to be applied when the contract provides for the satisfactory performance of the employee's duties. Some of the cases hold that the employer is the sole judge of what is satisfactory or not. Where a contract of employment provides for its termination upon giving a stipulated notice, such condition must be complied with, and a discharge or abandonment without the required notice is unlawful. A contract of employment may be terminated by agreement of the parties or by their consent, either express or implied.

A rule requiring two weeks' notice of intention to quit services on pain of forfeiture of wages due has been held to be reasonable, and, if assented to by the employee, becomes part of the contract of employment.

Unless the contract of employment is terminated at will, an employer can arbitrarily discharge his employee, but only for good cause. Any act of a servant which injures or has a tendency to injure his master's business or reputation will justify his dismissal. That his services are no longer needed will not justify the discharge of a servant, nor can a master discharge for trivial reasons. A discharge for refusal to work on Sunday is unjustifiable and gives the employee a right of action. Absence from place of employment without leave, even for a day, has been held to justify a discharge. Inaccuracies and discrepancies in the books of a merchant are sufficient cause for the discharge of a bookkeeper. A servant is bound to use due care, and habitual negligence in the discharge of his duties or any neglect which may or does affect his master injuriously will warrant his dismissal. Insubordination, intoxication or intemperance have been held sufficient to warrant a discharge of a servant. Absence on account of illness is no excuse on the part of an employee, and an employer may discharge on this ground.

A master may set off against wages due a servant damages occasioned by the servant's negligence. When a servant whose wages are due and payable periodically refuses to serve in the manner contracted for, or is rightly discharged at any intervening period between the days when his wages are due, he can recover nothing for that portion of time during which he has served since the last periodical payment.

There is no obligation imposed by law on a master to give a testimonial of character, or letter of recommendation, upon the termination of a contract of employment. Where there is a custom among railroad companies to keep a record of the causes for which employees have been discharged, and for one company not to employ persons discharged by another for certain causes, a company is liable to a discharged employee for making a false entry on its records as to the cause of his discharge, which has prevented him from obtaining employment.

Upon his discharge a servant must leave peaceably, regardless of whether the discharge was rightful. If the servant fails to leave peaceably, or after doing so returns, he becomes a trespasser, and may be ejected by his master, even though his wages have not been paid in full.

Having considered how the relation of master and servant may be created and terminated, we will next discuss the important legal consequences which result from his association.

Rights and Liabilities.

Having indicated the manner in which the relation of master and servant may be formed, we will next direct our attention to an inquiry concerning the mutual rights and liabilities incident thereto.

The master is bound by the act of his servant, either in respect to contracts or injuries, when the act is done by authority of the master. If the servant does an injury fraudulently, while in the immediate employment of the master, the master as well as the servant has been held liable in damages, and the master is also said to be liable if the injury proceeds from the negligence or want of skill in the servant, for it is the duty of the master to employ servants who are honest, skilful and careful.

In order to establish the liability of an employer for an injury caused by the carelessness or negligence of a servant, it is not enough to show that the latter was at the time acting under an employment by the former; it must be shown in addition that the employment created the relation of master and servant. A contractor for a job by accepting and paying for work done thereon by a mechanic without his prior order or authority does not render himself liable for injuries caused to a third person by a negligent act committed by the mechanic while doing the work, not a part or result of the work itself, such as carelessly letting fall a brick.

The relation of master and servant exists where the employer selects the workman and may remove or discharge him for misconduct, and may order not only what work shall be done, but the mode and manner of performance. The power to control the alleged servant is the test of the existence of the relationship and the basis of the employer's liability for injuries to third parties. It has been held that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction or supervision of the employer, the latter is not responsible for the acts of the former, and for this reason an independent contractor, as this term is understood in law, is not a servant so as to make a master liable for his acts. Railway postal clerks are not the servants of the railway company, nor is an inmate of a hospital the servant of

the superintendent thereof. It is interesting to note that the law does not hold a master liable where the negligence is that of a substitute engaged by a servant without any authority to delegate his master's power as to the particular work in charge of the servant.

The law is well settled that corporations are liable for the acts of their servants while engaged in the business of their employment to the same extent and in the same manner that individuals are liable under similar circumstances.

Special Employment.

Suppose a livery-stable keeper furnished a driver and team to a customer for a specified time or for a particular purpose. If the driver is placed under the exclusive control of the hirer, the latter is liable in case of accident, and not the master of the driver (the livery-stable keeper). From this illustration we may lay down the following rule, viz., A person who avails himself of the use, temporarily, of the services of a servant regularly employed by another person, is liable as master for the act of such servant during the temporary service. In such cases the test of liability is whether in the particular service the servant is engaged to perform he continues under the control of his regular master or becomes subject to that of the person to whom he is hired. Thus, where a company selling fireworks furnished employees to fire them off, but such employees are under the control of the purchasers, the company is not liable for an injury to a bystander caused by the negligence of such employee. If, on the other hand, the purchaser did nothing in connection with fireworks more than to locate the stand where the display took place, the servants being sent by the seller directing the display and the seller paying their expenses, such servants in discharging the fireworks are the servants of the seller, who becomes liable for their negligence.

Limitation on Master's Liability.

A master is, of course, only liable for the acts of his servants, provided such acts are within the legitimate scope of the servant's employment. A master is not liable for a servant's acts which are not within the scope of his employment, although such acts be intended to promote the master's interests. The test of liability is not limited to the character of the act, nor whether it was done during the existence of the servant's employment, but

whether the injury complained of was committed by the authority of the master expressly conferred or fairly implied in the nature of the employment and the duties incident to it.

This limitation of a master's liability to acts within the line of the servant's duties has certain important exceptions. In the first place, railroad companies have been held responsible for assaults committed by their servants upon passengers, upon the ground that they undertook an additional duty involving the utmost care and good faith, the master's extra liability being based on the ground of public policy, it being more reasonable that the master who has placed his servant in a position of trust than the irresponsible stranger should suffer. Upon the same grounds it has been held that a shopkeeper is liable for the acts of his servants toward a customer in the store, even where such acts are not committed within the strict line of employment.

Where an injury occurs to a third person through the improper execution by a servant of a lawful act, the master alone is liable therefor.

It was formerly the law that a master was not liable for the wilful and malicious acts of a servant, as distinguished from negligent acts, but the law is perfectly settled to-day to the effect that the master is liable for the wilful and malicious acts of his servants where they are done in the course of his employment and within its scope. However, if a servant does a malicious act while engaged in his master's work, but outside of his employment, to gratify some personal animosity, the master is not liable. The owner of a race horse is liable to the owner of a competing horse where his rider fouls or intentionally runs against him.

A master, as a general rule, is not liable for the criminal acts of a servant, not authorized or sanctioned by him, such as larceny, counterfeiting, etc. The Courts have held that where a watchman is employed to protect a building from burglars and himself enters and commits larceny therein, the employer of the watchman is liable to the owner of the building, although the act was outside the scope of the servant's employment.

If a servant step aside from his master's business for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is his own. Thus, it has been held that where proper care has been observed in selecting honest and faithful officers, a bank is not responsible for a loss resulting from carelessness not in the course of the officer's business.

Where a person or corporation is compelled by law to employ an individual in a given matter, no liability will attach for the negligent act of such servant. For example, if a municipal corporation is obliged to let a contract to the lowest bidder, it would not be liable for the negligent acts of such.

The broad rule that a master is liable for all the acts of his servant within the scope of his employment, is equally as applicable in the case of contract obligations as in the case of torts, i. e., negligence, etc. But the power of a servant to bind the master on a contract is included more properly in the subject of agency, which has already been discussed.

The terms "course of employment" and "scope of the authority" are not susceptible of accurate definition. An act is within the scope of the servant's employment where necessary to accomplish the purpose of his employment and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act rather than its method of performance is the test of the scope of employment. Where a servant employed to deliver milk to a factory mixed it with filthy water to gratify his malice toward his employer, and then delivered the milk, it was held that the tort was committed within the scope of his employment.

It may appear contradictory to state that a particular act of a servant may be within the scope of his employment, although it violates the express instructions or orders of the master, but such is nevertheless the case. For instance, where a master instructed his servant to go to a certain place and kill a beef, and the servant went and finding no animal there but a bull belonging to another killed and dressed that, the master was held liable.

A master is ordinarily liable for the trespasses of his servants, but not if the trespass be criminal and felonious. It is a well-settled principle of law that where a wilful injury is done by an agent, by the command or authority of the principal, both are, in law, principal trespassers, and therefore jointly liable. In other words, both the master who commands the doing and the servant who commits an act of trespass may be made responsible as principals, and may be sued jointly or severally. Again, the wrongful acts of a servant may render him personally and alone liable to a third person.

No action can be maintained against a servant unless he can be considered a wrongdoer, and where the servant obeys the commands of his master without negligence on his part, he is not liable for injuries to third persons unless he knew or had reason

to believe that the act or acts were hazardous and liable to occasion injury to some third person.

The weight of authority holds that a servant is liable to his master for damages which the master has been compelled to pay to third persons because of the negligent or other wrongful act of the servant, where the master is not himself in fault. He is also liable for the amount voluntarily paid by the master to the third person because of the acts of the servant, provided it is not in excess of the sum for which the master was legally liable.

Duties of Master Toward Servant.

When a servant enters into the employ of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment. Consequently he cannot recover for injuries resulting to him therefrom. In performing the duties of his position, the servant is bound to take notice of the ordinary operation of familiar natural laws and to govern himself accordingly. If he fails to do so the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes, and if he fails to do so he cannot charge the consequences upon the master. A servant does not, however, assume the risk of any dangers arising from unsafe or defective methods, surroundings, machinery, or other instrumentalities unless he has or may be presumed to have knowledge or notice thereof.

The rule of law regulating the obligation between master and servant is that the former is liable for all accidents occurring in the course of the employment, which are not induced by the carelessness or improper conduct of the employee. In other words, the master is bound to use reasonable care and diligence to prevent accident or injury, and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence. The master is only required to exercise such ordinary and reasonable care and protection for the safety of his servants as the nature and dangers of the business demand.

Persons employing minors must anticipate the ordinary behavior of children, must take notice of their lack of judgment, and must exercise greater care toward them than is required by law to be exercised toward adults. That is to say, where a minor is employed in a business, the danger of which he is unable by reason of his immature judgment to comprehend, and is injured,

the master is liable. That a minor answers falsely as to his age, and secures employment by so doing, in violation of a known rule against employing minors, does not make him a trespasser or deprive him of his right to protection as an employee, when actually engaged in his employer's service.

A contract between master and servant before the happening of an injury, whereby the servant, in consideration of the employment, agrees to release and discharge his master from liability on account of injuries caused by the negligence of his master or the latter's servants, is void as against public policy. If, however, an employee agrees, upon becoming a member of his employer's relief association, that the acceptance of relief therefrom on being injured shall bar his right of action against his employer for the injury, such contract is not void as against public policy. The acceptance of benefits under such a contract bars an action for damages on account of the injury.

The master must furnish the servant with a safe place within which to work, safe tools and appliances with which to work, must give instructions regarding work, the danger of which is not apparent, and must employ competent fellow-workmen or servants.

A servant not only assumes the risks that existed at the beginning of his employment, but also those arising in the course of his employment. It is sufficient if the master furnishes his servant with reasonably safe and suitable appliances and places in which to work, the law not requiring him to furnish the most expensive, newest and best machinery. The master's liability is met when he furnishes such as are reasonably safe and suitable for the purpose.

If a servant of full age and ordinary intelligence upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same knowing their dangerous character, although unwillingly and from fear of losing his employment, and is injured, he cannot maintain an action against the master for the injury.

The measure of the master's duty is reasonable care, and this necessarily has relation to the parties, the business in which they are engaged, and varies according to the exigencies which require vigilance and attention, conforming in amount and degree to the circumstances under which it is to be exerted. It is not necessary in order to entitle a servant to recover for injuries received from defective machinery, that he should show that the master had

actual knowledge of such defects. It is enough if he shows that he ought to have known of them, and might have known by the exercise of reasonable care on his part in examining and inspecting the appliances.

The measure of care imposed on the master for the safety of his servant in the use of dynamite or other explosives is that ordinary care which reasonable and prudent men would exercise under like circumstances, and where a master furnishes an explosive known to him to be dangerous and unsafe for the use to which it is to be put, or which has never been used for the purpose, and is in fact unfit and unsafe therefor, he is guilty of negligence. Likewise, where a servant is injured by an explosion which is the necessary result of improper appliances the master is liable.

Where the master knows or should know that an animal used by him is vicious, or that his harness is not reasonably safe, he is liable for injuries to his servant as a result thereof.

We have already called attention to the fact that a master is required to provide his servant with a safe place in which to work. It should be borne in mind, however, that this rule does not apply to a case where servants are creating a place of work which is constantly changing in character by their labor, when it only becomes dangerous by the carelessness or negligence of the workmen when the dangers which arise are only short lived, or when, by the negligence of the workmen, the place is rendered unsafe without the master's fault or knowledge.

Where the work is the construction of a new building the master is not under the same duty as he would be if the building were complete and fitted for use, and he cannot be held to the same degree of care with respect to temporary floors, or other structures, mainly constructed by the workmen for their own use, for purposes which are constantly changing as the work progresses and which uses in the nature of things cannot in all cases be foreseen by the master. If a servant chooses his own position on a bridge in course of construction while a portion of the work is going on, it is not the master's duty to have a representative present to see that the place is safe. The law also holds that it is no part of the duty of a master to his servant, employed in a building properly constructed for the ordinary business carried on within it, to provide a means from fire, in the absence of statutory requirement that a fire-escape be erected. Where scaffolds, platforms, staging and the like are provided servants in connection with their work, the master must see that same are safe; but if such structures are made by the servants from

materials furnished by the master, who has no direction or control over their construction, he is not liable for injuries sustained by one of the workmen by reason of defects therein.

In the case of elevators and like constructions, the duty is imposed on the master to see that same are safe and suitable for the purposes for which they are intended; the master's duty is performed in this regard when he purchases his elevator from reliable and competent manufacturers, has it placed in working order by them and has it regularly inspected by experts. Even though an elevator be primarily intended for a freight elevator, if in the course of their employment servants are authorized and directed to use same as a means of personal transportation, the employer or master is liable for any accidents happening from defects in the elevator or operation thereof, which proper care and caution could have prevented.

The duty of a railroad company to its employees is no higher than that required of other masters. It has been held that where an employee of a railroad company is injured by the fall of coal from a locomotive tender which has been improperly overloaded the company is liable. A railroad company is bound to exercise reasonable care and diligence to prevent obstruction or erections on, over or near its tracks, which are a source of danger to its servants, and will be liable for injuries occasioned by its neglect of duty. Thus it has been held that if a railroad company knowingly maintains or permits a bridge over its tracks so low that brakemen cannot perform their duty on top of the cars with reasonable safety, it is liable to a brakeman who, having no knowledge of the dangerous character of the bridge, is struck by it and injured in the performance of his duty.

Not only is it the duty of a master to use ordinary care to furnish his employees with a reasonably safe place to work, and with reasonably safe machinery and appliances, but he must also by inspection from time to time and by the use of ordinary care and diligence in making repairs keep them in reasonably safe condition. The rule is, nevertheless, well settled that the mere failure to inspect is not negligence where an inspection would only show what was already known to the servant. Where, however, a careful inspection would not disclose a defect, the master is absolved from liability for not doing so. In many States statutes have been passed providing for official inspection of places of work, machinery and appliances. Such an official inspection does not, however, relieve a master of his duty. For instance, the certificate of a factory inspector approving a fire-escape does not

relieve the employer from liability for negligence in not providing a safe landing place. A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant and which could not be discovered in the exercise of reasonable care and diligence. The Courts have ruled, however, that a master must keep pace with scientific development as it affects his business, and keep himself and foreman informed of latent danger, even though it be scientific information, if it be readily attainable. Observation of and compliance with these simple legal requirements would prevent countless injuries and unnecessary litigation.

Contributory Negligence.

In connection with the master's duty toward his employee, as above outlined, it is appropriate to discuss briefly the doctrine of contributory negligence on the part of the employee.

It is the rule of both the civil and common law that one who by his negligence (legally defined as want of proper care under the circumstances) has brought an injury upon himself cannot recover damages for it. The question is whether plaintiff so far contributed to the misfortune by his own negligence or want of ordinary care, that, but therefor, the misfortune would not have happened. If so, there can be no recovery. Contributory negligence on the part of a minor will defeat his right to recover for an injury as in the case of an adult. The law, however, regards a minor under the age of seven years as incapable of contributory negligence. Where both the master and the servant have equal knowledge of the danger of the service and of the means of avoiding it, and the servant while engaged in the performance of the work he is set to do, is injured by reason of his own inattention and negligence, the master is not liable. An engineer injured while running behind schedule time at a speed greater than was allowable, but which was, according to the practice of the company, excusable in belated trains, is not guilty of contributory negligence and may recover damages for his injury. It has been held by the Supreme Court of Pennsylvania that where a conductor went forward to give the engineer warning although the rule required him to remain in the middle of the train, that the error was a reasonable one and that he was not guilty of contributory negligence. Projecting the person beyond the side of a car constitutes contributory negligence. Getting on or off

a moving conveyance is contributory negligence, as is also the failure to "stop, look and listen" before passing a grade crossing.

Where an employee in the course of his employment finds himself in imminent peril through the negligence of his employer, and in the terror of the moment adopts an unsafe course exposing him to a greater peril, such action on his part is not attributed to negligence and will not prevent a recovery.

In the case of a skilled workman operating a dangerous tool, a high degree of care is required on his part. Such person is bound to exercise his thinking faculties and give careful attention, and if he fails to do so and is injured in consequence he is guilty of contributory negligence which will prevent his recovery for such injuries. Where a servant is killed while on duty, the law will presume that he exercised due care, and the master, to avoid liability, must clearly establish contributory negligence on the part of the servant.

Where a servant continues working with knowledge of danger, which an ordinary prudent man would refuse to subject himself to, he is guilty of contributory negligence, but where a servant notifies his master of defects in the tools, machinery, appliances or ways and places for work and the master promises to remove or repair them, a servant is not guilty of contributory negligence by continuing at work for a reasonable time.

"Fellow-Servants."

Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is generally an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of all may require. The negligence of a fellow-employee is one of the risks incident to the employment, and is assumed by every servant who undertakes work in association with others.

A rule of law has consequently been universally adopted by the Courts of England and America to the effect that a master is not liable for injuries to a servant caused by the negligence of a fellow-servant engaged in the same general business, where the master has furnished proper means for carrying on the work and has used due care in the selection of servants. It is important

to determine who are fellow-servants within the meaning of the rule stated. Speaking broadly, all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, although it may be in different grades or departments of it, are fellow-servants, each assuming the risk of the other's negligence; to constitute fellow-servants, the employees need not be at the same time engaged in the same particular work. It is sufficient in the language of the Supreme Court of Pennsylvania, "If they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purpose." The captain of a steamboat who is a part owner thereof is not the fellow-servant of a deckhand. A shipper of live stock by accepting a pass permitting him to accompany the stock and attending it in transit, does not become the servant of the carrier and is not within the fellow-servant rule. Servants of separate masters, although engaged in a common undertaking, are not fellow-servants. A person who is temporarily working for one while in the general service of another must be treated as to that particular employment as the servant of the person thus employing him and the person who has the right to direct and control his conduct in that particular business must likewise be regarded as his master, for the existence of a general relation of master and servant does not exclude a like relation between the servant and a third party to the extent of the special service in which the servant may be actually engaged.

A man who voluntarily assists the servant of another cannot recover from the master for an injury caused by the negligence or misconduct of such servant, since he can impose no greater duty on the master than a hired servant.

It may be stated as a general rule that a servant not on duty is not a fellow-servant of those engaged in the same common employment so as to relieve the master from liability to him for injuries resulting from their negligence. A number of cases have held that servants on their way to and from work are, although not actually on duty, fellow-servants of other employees of the master engaged in the same common employment. Thus a laborer walking on a railroad track to his work and an engineer operating an engine on the track are fellow-servants, and the former cannot recover from the company for injuries caused by the negligence of the latter. A master is required to employ a sufficient number to perform safely his work, and is also bound to exercise diligence in the selection of his servants, and if a servant sustains

injuries through the incompetence of a fellow-servant whom the master has been negligent in employing or retaining in service, the injured servant may recover for such injury. The fact that a servant is physically disabled to perform his duties or is too youthful is sufficient to charge the master with negligence in employing him. Should an injury result to one servant from the intoxication of a fellow-servant, the master could not avail himself of the fellow-servant rule if he knew of the drinking habits of his servant. But occasionally taking a drink or occasionally being under the influence of drink does not constitute such a habit of drinking as would authorize a finding that a servant was rendered incompetent thereby.

BUSINESS CRIMES.

*Definition — Conspiracy — Embezzlement — Forgery — Larceny —
Libel — Trespass — Nuisances — Malicious Prosecution.*

IN view of the numerous criminal prosecutions which have in the recent past been instituted against large financial interests, and the general crusade that is being waged to protect the public against dishonest business methods, it seems timely to consider what may be termed "Crimes in Business."

Public policy or the public good is the ground upon which certain acts are declared crimes and punished, while others which may seem to some equally wrong are not. Retributive justice does not of itself warrant infliction of punishment, for God alone can punish on that ground; but where the public good makes punishment necessary as an example to deter others the offender's punishment justifies its infliction on him. Although no injury can be done any member of the community without injury to the community itself, wrongs which operate as a serious injury to an individual are unnoticed unless they perceptibly injure or endanger the other members of the community. For instance, in a certain case a man was charged with having falsely and deceitfully sold to another sixteen gallons of malted liquor for, and as, eighteen gallons. It was held that such an act was not an indictable offense, because it was merely an injury to a private person. If, however, a man uses false weights and measures and sells by them to all or to many of his customers, or uses them in the general course of his business, it would be such an offense as affects the general public, and hence punishable as a crime. Likewise any deceptions practiced in business which common care and prudence are insufficient to guard against are crimes.

Such wrongful acts as affect only an individual are classified as private wrongs or torts, such as affect the public as crimes or misdemeanors. When an act is both a tort and a crime the wrongdoer is liable both to a civil action by the person he has particularly injured and to a criminal proceeding by the State. The object of these two proceedings are quite distinct; the civil action is for the purpose of obtaining redress for a private injury, the object of the criminal proceeding is to punish the wrongdoer as an example. Another important distinction which should be carefully observed

is that in cases of torts the injured person may settle with the wrongdoer, or may refrain from bringing any action against him, whereas, in cases of crimes, as soon as a crime is committed, the injury is done and the State's right and duty to punish accrues. The person particularly injured has no control over the criminal proceedings and no settlement between him and the wrong doer can make the act any the less a crime or take away the State's right to punish it. As a matter of fact, if a person attempts to settle with the offender, or agrees not to inform on him, he is himself guilty of a crime. To attempt to settle any of the higher grades of crimes for a cash consideration is blackmail. Statutes in most of the States have made it permissible to settle minor crimes or misdemeanors.

A person may commit a crime simply by remaining passive when the law requires him to act. To illustrate: A father is guilty of a crime who fails, when able, to furnish food to a child who is dependent on him and who dies from the neglect.

No better definition of a crime can be given than that contained in Blackstone: "A crime, or misdemeanor, is an act committed or omitted in violation of a public law either forbidding or commanding it." Crimes have been divided according to their nature into crimes *mala in se* and crimes *mala prohibita*. The former class comprises those acts which are immoral or wrong in themselves, such as murder, arson, larceny, etc., while the latter class comprises those acts to which, in the absence of statute, no moral turpitude attaches, and which are crimes only because they have been prohibited by statute.

A crime must be an act either prohibited by the common law or by statute. There are acts which may never before have been committed, but which, when they are committed, may be punished. The fact that a man does not know what the general sanctions of the common law prohibit is immaterial, for he is presumed to know the law, and ignorance is no excuse. Morality and the teachings of Christianity have exercised a potent influence in the formation of the common law. Such acts as the heart and conscience of every mentally-responsible human being declared to be wrong are punishable by the common law. Such acts as in themselves are not wrong may be constituted crimes by the Legislature on account of grounds of public policy.

Of course, no one can be held responsible for a crime, or even be guilty of a crime, unless he has sufficient capacity mentally and otherwise to commit it. The test of responsibility is the power of the offender to differentiate between what is right and what

is wrong. Consequently insanity and infancy are complete defenses against charges of crime.

Voluntary drunkenness at the time a crime is committed affords no defense, nor is emotional insanity available to avoid the punishment for criminal acts. It has been held that a corporation may be criminally liable for omission to perform a duty imposed upon it by law.

It is not necessary that one actually commits a criminal act to be guilty thereof. One may employ an innocent person to perform an act such as the delivering of poison to another, but is nevertheless liable as a principal for the crime committed. Any one who aids or abets the commission of a crime is guilty as an accessory thereto. Furthermore a mere attempt to commit a crime is itself punishable as such, whether or not any overt act was ever done in carrying out such unlawful purpose.

An offense committed by a wife in the immediate presence of her husband is presumed to be done by his coercion and in such event the wife is not liable for her act. Coverture is no protection against the consequence of a criminal act, when the part taken by the wife is shown to have been active and willing. Where a wife procured a check and suggested to her husband the idea of raising it, and he in her presence erased the payee's name and the amount, and when she was not present filled the space with a larger amount, she receiving nearly one-half the proceeds of the crime, it was held that she was not properly convicted as a principal. A wife cannot commit larceny by stealing her husband's goods, neither can she embezzle them. Neither can a wife be convicted of receiving stolen goods from her husband, where they were stolen by him and delivered to her.

No person can be held liable criminally for an act which it is not in his power to prevent. In cases of extreme peril from shipwreck where there is a necessity that a part should be sacrificed to save the remainder, a decision by lot is ordinarily resorted to unless the peril is so sudden and overwhelming as to leave no choice of means and no moment for deliberation. Actual force upon the person or personal restraint, or fear of personal injury or imprisonment, excuses acts committed during the continuance of such force or duress.

Having in a general way analyzed the elements which constitute a crime, we are in a better position, it is hoped, to consider those particular crimes which affect a man in his business relations.

Criminal Conspiracy.

One of the most serious in the calendar of crime is that of conspiracy. Any consideration to do an act which amounts to a civil wrong is a criminal conspiracy. As soon as the unlawful combination or agreement is entered into the crime of conspiracy is complete, and it is not necessary that there should be any act done or attempt made to carry out the agreement. A combination of persons to commit a wrong is so much more dangerous, because of the increased power to do the wrong, that the law regards it as criminal, whereas if the wrong were attempted by a single individual the act would not be punishable as a crime.

It has been held criminal to conspire to do acts which will prejudice the public generally, as for instance to manufacture a spurious article to sell as genuine; to obtain a monopoly, and raise the price of a commodity, so as to compel consumers to purchase at an exorbitant price. A combination entered by dealers to prevent competition in the sale of coal has been held to constitute a criminal conspiracy, without regard to what was done, and, though the object was protection from ruinous rivalry, and no attempt was made to charge excessive prices. The gist of the offense of conspiracy is the unlawful confederacy to do an unlawful act or to do a lawful act by unlawful means.

One of the most common forms of conspiracy in business is to cheat and defraud, and a division of the profits of a fraudulent transaction is sufficient evidence of a combination or conspiracy to defraud. An agreement to defraud any person, class, company or corporation constitutes a conspiracy. Any understanding by two or more persons to dispose of goods in contemplation of bankruptcy is punishable as a conspiracy.

Any agreement to depress the value of the capital stock of a corporation dealt in on the Stock Exchange is a crime. The law punishes any joint effort to purchase goods upon misrepresentation of solvency or with no expectation of paying for same, as a conspiracy.

No one is authorized to destroy or hinder unlawfully the lawful business of another for the purpose of helping himself. Any conspiracy to injure a man in his trade or profession is indictable as a crime. A combination between one member of a partnership and a third person to issue and circulate the notes of the firm drawn by such parties for the purpose of paying his individual debts is criminal. A conspiracy is indictable where the object is to cheat by fraudulently overvaluing a commodity.

The labor and skill of the workmen, the plant of the manu-

facturer and the equipment of the farmer are in an equal sense property. Every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and, if two or more persons combine to coerce his choice in this behalf it is a criminal conspiracy, whether the means employed are actual violence, or a species of intimidation that works upon the mind.

Conspiracy to compel an employer to discharge certain workmen and threatening to quit the employment if he does not, has been held to be an indictable conspiracy, although many States have passed special statutes with reference to trade unions. The courts have held that associations of men may endeavor peaceably and in a reasonable manner, to persuade others to cease or abstain from work; but if by force or intimidation they endeavor to control the free agency, or overcome the free will of their fellow-workmen they become guilty of a penal offense. The exposure of a legitimate business to the control of an association that can order away its employees and frighten away others that it may seek to employ, and thus be compelled to cease the further prosecution of its work, is a condition of things utterly at war with every principle of justice and with every safeguard of protection that a citizen under our system of government is entitled to enjoy.

The law likewise makes it criminal for employers to combine for the purpose of depressing the wages of labor which is prejudicial to the public and oppressive to the individual. The "boycott" is not the remedy to adjust the difference between capital and labor.

It is unlawful for employers wrongfully to coerce, intimidate or hinder the free choice of workmen in the disposal of their time and talents. It is commendable for any body of men to associate themselves together for the purpose of bettering their financial and social condition, and the very genius of free institutions invites them to higher levels and better fortunes. There is nothing unlawful in a strike to compel an employer to comply with certain regulations and when on said strike in "picketing" the employer's premises.

By "picketing" we mean watching and speaking to the workmen as they go to or return from their employment, to induce them to leave the service, so long as they abstain from actual violence. Men may lawfully combine together to dictate their own wages, fraternize with their own associates, choose their own employers, and serve man and mammon according to the dictates of their own conscience.

In all conspiracies it should be remembered that the act of

each conspirator is the act of the other if done in the prosecution of the common design. Any participation in a concerted plan to injure another by fraud or otherwise renders a party liable as principal. If an act in its natural characteristics and quality is unlawful, knowledge of its wrongful character is presumed.

Embezzlement.

Embezzlement is a fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. It differs from larceny in that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking. This crime is a statutory offense and involves two general elements—(1) a breach of duty or trust in respect of money, property or effects, in the party's possession belonging to another; (2) the wrongful or fraudulent appropriation thereof.

Where a person drawing his deposit from a bank is by mistake paid more than is due him he is not guilty of embezzlement, but may be sued for the difference in a civil action. There must be a relation of confidence and trust between the person appropriating property and the owner to constitute embezzlement, and the appropriation must be with a fraudulent intent. Mere breach of contract, as, for instance, a failure to pay back borrowed money, or a mere neglect to pay over funds, is not sufficient. If a servant, clerk or agent has merely the custody of the money or goods which he feloniously appropriates the offense is larceny; if he has the possession it is embezzlement. Custody as distinguished from possession in the connection here used means a charge to keep and care for the owner, subject to his order and direction, without any interest or right therein adverse to him, which every servant possesses with regard to the goods of his master confided to his care, which custody may be terminated or prolonged according to the will and pleasure of the master. Where, however, the owner of personal property delivers it to another for any purpose, intending not only to impart with the custody, but with the absolute right and control of the property for any length of time, he parts not only with such custody, but the legal possession as well. A trust relationship must exist at the time of the reception of the money by the agent or employee or the money must be under the care of the agent by virtue of his agency or employment, in order to constitute the crime of embezzlement.

Forgery.

In connection with the crime of forgery it has been held that where a person procures the signature of another upon a blank paper, and without authority from the latter, writes a promissory note or other apparently valid instrument above it, he is guilty of forgery. This rule of law applies to cases where an agent, having the genuine signature of his principal with instructions to write an instrument disobeys his instructions.

The fraudulent alteration of an instrument, with intention to defraud or prejudice another, is such a false making as to constitute forgery. The signing of a fictitious name is not forgery when the offense is not the assumption of the name of a supposed third person, but is merely the adoption of an alternative name of the party charged. Likewise where one subscribes a fictitious name to a check, and passes it as his own, it will not be forgery if credit is given to the person rather than the name.

The intent to defraud is not limited to obtaining money or property; it is sufficient if the forged instrument is to the prejudice of the rights of some person. The intent to defraud cannot be overcome by the fact that the forgery was not successful and that no one has been prejudiced. While it is true, as a general proposition, that a person cannot be punished for forgery for making false entries in his own books, yet it has been held that it is forgery to make false entries in pass books, to make false entries in books of original entry, to make false entries in book settlements, and for a clerk to make false entries in books he is employed to keep.

An instrument to be the subject of forgery must possess some legal effect. Consequently an instrument void on its face cannot be made the subject of forgery. Instruments showing a legal liability on the part of a party whose name is purported to be signed thereto to pay a sum of money are subjects of forgery; but it is otherwise as to an instrument not payable in money nor to the bearer, and which the maker only promised to take in payment. Where a promissory note is, after being endorsed by the payee, altered by the maker and discounted by him, it is a forgery of the note and not of the endorsement. Checks are subject to forgery even though post-dated.

Uttering Forged Instruments.

While the making of a forged instrument and the uttering of it by the same person as one transaction constitute but one offense, one may be guilty of uttering an instrument forged by

another, but to constitute the latter offense it is necessary that the person who utters (passes) the forged instrument should have actual knowledge of its falsity. It will be noticed that the uttering of an instrument which is not a forgery does not come within the definition; nevertheless the uttering of a false instrument, with intent to defraud, is an offense, although there was lack of evil intent in the person who fabricated the instrument.

Uttering and publishing of a forged instrument consists in the delivery of such instrument to another for value, with an intention that the same shall be put in circulation, and an intention thereby to defraud by using it in some way so as to get money or credit thereon or by means thereof. The following case will illustrate what constitutes an uttering of a forged paper: A, a stranger in Omaha, met B who professed to have a large farm near St. Louis, and desired to employ A to superintend it. While they were conversing a pretended freight agent appeared who was introduced by B to A as such, and who demanded of B the payment of a pretended freight bill of \$65. B pretended he had not sufficient change to pay the bill, presented to A a forged check on an Omaha bank for \$250, saying he could get the money on presentation, and asked him to cash it. The Court held that this transaction constituted an uttering of the check, although it was not actually transferred.

Presentation of a draft or order for money to the person to whom it purports to be directed, for payment thereof, by one knowing it to be forged, although payment is refused and the draft is returned to the presenter, is an uttering and publishing within the meaning of the statute. Depositing with a bank for collection notes containing forged endorsements, with intent to defraud, in a case where both the holder and the maker know of the existence and character of the forged endorsement is a criminal act. Collecting money on a forged endorsement is an uttering whether or not it is produced at the time payments are received.

In concluding our discussion of the crime of forgery we may summarize as follows: To render one liable for forgery it is not essential that the instrument on which the prosecution is based should have been made or altered by defendant himself. He will be guilty of the offense if with fraudulent intent he procures this to be done by another, or after procuring it to be done utters or publishes it; and it is immaterial that the person making or altering the instrument is innocent of any fraudulent intent. One who procures another to utter a forged instrument is as

culpable as if he had perpetrated the act himself. One is also guilty of forgery where he procures another to sign the latter's own name, which the former thereafter represents to be that of a third person. It is an elementary proposition of law that all who act together with a common design are principals. The degree of aid or assistance given in the forgery of papers with the intent to defraud has been held to be unimportant. Where an insurance agent forged an application for insurance and notes for the premium, and sent them to his company for the purpose of fraudulently securing his commission, it was held that he could not escape conviction on the ground that the forgery was discovered and no policy issued, and the notes never became valid obligations for the payment of money.

Larceny.

The crime of larceny is frequently committed in business circles, and we will, therefore, confine our attention briefly to a consideration of the elements which comprise this offense.

Larceny has been defined as the wrongful and fraudulent taking and carrying away by any person of the mere personal goods of another, from any place with a felonious intent to convert them to the taker's use, and make them his property without the consent of the owner. The taking is an essential part of the crime of larceny, but the stolen property need not pass into the actual manual possession of the thief. It is not necessary that the taking of another's property be done with felonious intent, if there be a subsequent wrongful appropriation thereof. To illustrate: A drove away a flock of lambs from a field, and in so doing inadvertently drove away with them a lamb, the property of another person, and as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it. This was held to be larceny. The distinction between larceny and robbery is that the former is done without violence or circumstances of terror resorted to for the purpose of inducing the owner to part with his property, whereas the latter is the taking of another's property by force. At common law the only subjects of larceny were tangible movable chattels, something which could be taken in possession and carried away, and which had intrinsic value. In Pennsylvania statutes have been enacted making it larceny to misappropriate stock certificates, promissory notes, bills of exchange, checks, receipts, account books, letters patent and other commercial specialties which, at common law, could not be made the subjects of larceny.

In business transactions this crime most frequently occurs when one seeks to obtain property in the possession of another upon the erroneous impression that it belongs to the taker, without legal process of course. In order to constitute larceny, it is essential that possession of another's property be obtained unlawfully; that is, against the will or without the consent of the owner. It is larceny for one to insert a metal disk in an automatic slot machine for the purpose of obtaining something of value, which the owner intended to part with only to one who placed a coin in the slot. It may seem paradoxical, but it is nevertheless the case that a man may steal his own property if by taking it his intent is to charge with its value one to whom he had bailed it.

A part owner of property cannot be convicted of stealing it unless the person from whom it was taken was entitled to its exclusive possession. The mere delivery of property to another for a special purpose vests in the person receiving it only the temporary charge or custody; the possession of the property remains in the owner and a conversion of it is larceny, as in the case of the delivery of money by the owner to another for the purpose of having it changed into other money of a different denomination. The same rule applies to the receipt and appropriation of money by one not entitled thereto, paid him by mistake. A delivery of property on condition of immediate payment does not transfer the right of possession to such property until the performance of the condition, and if the receiver of the property retains its possession without making payment he may be charged with larceny.

Where one dealer sends an order to another for a number of articles with the understanding that they were to be exhibited to a customer and those not sold returned, such dealer is guilty of larceny if he refuses to return the goods upon demand or account for their sale. Where goods were bought to be delivered C. O. D. and when so sent the buyer pays with a check which is subsequently returned with "not sufficient funds" marked thereon, and thereafter refuses to pay for the same and retains possession of the goods, he is guilty of larceny.

The felonious intention which is essential to the crime of larceny must, as a general rule, exist at the very time of the taking; no subsequent intent will render the previous taking felonious. This rule does not, however, apply to a bailee or to a person to whom property is delivered for some specific purpose.

Lost Property.

Lost property may be the subject of larceny and should receive the same protection from the law as goods in any other situation. To constitute theft of lost property the fraudulent intent which is the gist of the offense must exist in the mind of the taker at the time of the taking. The existence of such intent is properly inferred where the finder knows the owner of the property at the time of the finding, or had reasonable grounds of knowing who he is, and the same rule applies to the finding and appropriation of marked property, or any property where the finder has at the time of the finding any means of inquiry such as to give him reason to believe that with reasonable effort the owner will be found. To avoid a charge of larceny the finder of lost property should adopt all reasonable means of ascertaining the owner.

Where goods of a master are in a servant's custody, any act of the servant which is inconsistent with the master's retaining the possession of them is sufficient to constitute a taking of possession by the servant. If the owner of property places the same in the possession of another, such as a tailor or cobbler, who thereby acquires an interest in the goods for services rendered thereon, the owner will be guilty of larceny if he takes his own property from such bailee without his consent and without paying for his services.

If a chattel has been delivered and received under a mutual mistake as to its character, a subsequent misappropriation by the recipient will not constitute larceny. There are oftentimes cases where one takes another's property without his consent that do not amount to larceny. Thus, where a bartender refused to get up and serve some late customers and they helped themselves, offering to pay for their refreshment the next day, which they did, the court held no larceny was committed. Where one takes another's saddle but leaves more than sufficient property to pay for it with a letter directing the owner to pay himself out of such property the taker is not guilty of larceny. Some authorities are, however, to the contrary. It is an element of the offense that the taking must be felonious and for the purpose of gain.

Larceny by Bailee.

It has been made a crime by statute for any person who is a bailee of property to fraudulently take and convert the same to his own use, or to that of any other person except the owner

thereof. Anyone who hires property from another and refuses to return same is guilty of larceny by bailee. One leasing jewelry or other personal property upon the installment plan with an option to purchase same upon the payment of a certain number of installments is guilty of larceny by bailee if he default in the payment of installments and refuse to deliver the leased property upon demand being made thereafter.

Libel.

No more grievous wrongs can be committed in society than those which deleteriously affect a man's character and reputation. The faculty of speech, which is one of the first and noblest gifts of the Creator, has been abused for the purposes of blasphemy, fraud and malice, as has likewise the freedom of the press, which is one of the most potent safeguards of liberty. To place a bridle on men's tongues so that they may be restrained from calumny and to curb the licentiousness of the public press and other means of communication has been a problem which has engaged the attention of jurists from time immemorial. In view of their importance, we will endeavor in the present article to distinguish between these co-related offenses, and point out the limitations which have been imposed by law upon the written and spoken communications of men.

A libel has been judicially defined as a malicious defamation, expressed in print or writing, or by signs and pictures tending to blacken the memory of the dead, with an intent to provoke the living, or to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt and ridicule. It may be said generally that language in writing is libelous which denies to a man the possession of some such worthy quality as every man is presumed to possess, or which tends to bring a party into public hatred or disgrace, or to degrade him in society.

False defamatory words, if written and published, constitute a libel; if spoken, a slander. Libel has always been regarded as a more serious offense than slander, because anything that is written and published evinces a more deliberate intention to injure another and is calculated to circulate more extensively than mere oral words which, when spoken, are frequently soon forgotten or misunderstood. Many words if spoken of another give no right of action to the party to whom they refer, which, however, if written would be actionable. Words spoken must impute some crime so as to endanger the person to whom they

relate, or they must impute to him something which would tend to exclude him from society and lead one to avoid him. But a publication which renders the person ridiculous merely, and exposes him to contempt, which tends to render his situation in society uncomfortable and irksome, which reflects a moral turpitude on the party and holds him up as a dishonest and mischievous member of society, and describes him in a scurrilous and ignominious point of view, is considered as a libel.

A man has the same constitutional right to the protection of his character and reputation as he has to his liberty and property. The foundation of a man's redress for defamation, whether by libel or slander, is the injury done to his reputation. A mere injury to a man's feelings is not sufficient to enable him to sue for damages. The law recognizes certain inferences from the use of certain words, and if spoken or written of another, the injured party may recover without proof of special pecuniary damages. It can readily be perceived that other words may be used which in themselves are not defamatory, but which when used under certain circumstances may result in great injury to another.

What Constitutes Libel.

It may be stated as a general principle of law that any words are libelous which impute that the party to whom they refer has been guilty of a crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct, or which suggest that the plaintiff is suffering from any infectious disorder, or which have a tendency to injure him in his office, profession, calling or trade. In fact, the courts have gone so far as to hold that to use words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which by thus engendering an evil opinion of him in the minds of right-thinking men tend to deprive him of friendly intercourse and society, are libelous. It would be impossible to enumerate what words are libelous and what are not. To write of a man "I look on him as a rascal" is a libel; written accusations charging another with falsehood are libelous, but it has, singularly enough, been held that to charge one with being a "political" liar is not a libel.

A publication which imputes an unwillingness or refusal to pay just debts is libelous as tending to destroy the party's reputation for integrity and fair dealing. So it has been generally held libelous to publish or cause to be published one's name as

a delinquent debtor or as one unworthy of financial credit. But when the charge does not affect a person in his business or profession, it is not libelous to publish of him that he owes money, or to charge him with mere inability to pay his debts, or with failure to pay his debts. To write that a man is slow to pay his debts is not actionable.

Any publication which charges another with being guilty of a breach of trust or betrayal of confidence is libelous. We use the word "publication" in connection with a libel as any writing, or print, such as a caricature, which passes from one to another; in connection with slander as words spoken by one to another who is not the party to whom they refer. It is interesting to note, in view of the political rivalries of to-day, that it constitutes a libel to charge another by any publication with political corruption, or the use of political influence or privilege for pecuniary gain, even though the party against whom the charge is made is not a public officer or a candidate for office.

To charge another by word of mouth with being a drunkard is not in itself a legal offense unless it implies a disqualification in connection with a man's business or employment. In many jurisdictions statutes have been passed providing that all words which from their usual construction and common acceptance are considered as insults and tend to a breach of the peace are actionable.

The courts have recognized that it is the right and duty of newspapers to discuss measures relating to the morals, health, welfare, comfort and happiness of the public, but a newspaper is no more immune from liability for publishing libelous matter than is an individual. Editors have the full liberty to criticise the conduct and motives of public men, and the measures and policies of government, but the discussion must be fair and legitimate. If one goes out of his way to asperse the personal character of a public man and to ascribe to him base and corrupt motives, he must do so at his peril, and must either prove the truth of what he says or answer in damages to the party injured.

The law carefully guards the credit of merchants, traders and business men, and oral or written words imputing to them insolvency, bankruptcy or want of credit are actionable without any proof of special damage. A communication from a mercantile agency organized for mutual protection among business men is held to be privileged when made to one having an interest in the subject matter. It has been held that defamatory words come under the head of what is known in law as "privileged

communications" when published without malice to parties who have a common business interest in the subject matter of the publication, even though it is false and injurious.

Privileged Communications.

Statements may be written derogatory of another under such circumstances as to exonerate the party writing them from liability. It is well settled that fair and honest criticism in matters of public concern is privileged. All political, legal and ecclesiastical matters are matters of public concern. Criticisms of books, public institutions, theatrical and musical performances are deemed to be privileged, however severe or caustic such criticisms may be.

The law recognizes certain communications as privileged from motives of pure public policy which under ordinary circumstances would be libelous. Libelous or slanderous matter published in the due course of a judicial proceeding is absolutely privileged. This rule has, of course, its limitations. This privilege which is given to individuals in the interest of an efficient administration of justice cannot be abused as a cloak beneath which to gratify private malice. Statements made by witnesses in the regular course of a judicial proceeding are absolutely privileged, as are likewise the deliberations of a jury.

Where a party makes a communication, and such communication is prompted by a duty owed either to the public, or to a third party, or the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice. This privilege is not lost by the fact that the communication, whether oral or written, is incidentally brought to the attention of others than those for whom it was intended. Where unnecessary publicity is given to a communication malice will be inferred. It has been held under this rule that a communication which would be privileged if sent by letter becomes unprivileged if sent by telegram.

Persons who join churches, secret societies, benevolent or temperance organizations submit to the jurisdiction of those bodies in matters of faith and individual conduct affecting their relations as members, and subject themselves to tribunals established by those bodies to pass upon such questions. Accusations made by one member against another, or words spoken or written in the course of an investigation or trial, are regarded as privileged. If one man in the course of a dispute with another makes

certain inquiries the answer to such inquiries is privileged if such answer does not go beyond the question. Defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. Statements regarding the character of a suitor or lover made in answer to inquiries by one interested, or when volunteered by one who is under a duty to make it on account of his relationship, are privileged if made in good faith. It should be remembered, however, that such communications if volunteered will not be protected merely on the ground that the parties making them hold friendly relations with those to whom the communications are made.

A communication regarding the character of an employee, made to the employer or to one about to employ such person is regarded in law as a privileged communication, when made in good faith of course; and this rule applies whether the information was voluntarily given or was in answer to an inquiry. However, if such a communication is made solely for the benefit of the informant, as for example, for the purpose of compelling an employee to pay a debt due the informant, it is not privileged. To dictate a libelous letter to a stenographer or confidential clerk subjects the party doing so to an action for damages whether or not such letter was ever transmitted through the mails, or otherwise delivered or published.

When a man becomes a candidate for office his character for honesty and integrity and his qualifications and fitness for the position are put before the public, and are thereby made proper subjects for comment. False statements charging criminal or disgraceful conduct are not, however, privileged.

It is a general rule of law that in all civil actions of libel or slander, the defendant is justified and exempt from all civil responsibility where he alleged and established the truth of the matter charged as defamatory; the truth of the words spoken or written is a complete defense. Many of the States have enacted statutes to the effect that the truth is a defense only when published without malice. In other words, a man should be restrained from speaking the truth of another in an obviously malicious spirit, and without any apparent justification. One should be very cautious in what one says or writes of another, and should bear in mind that the fact that he believes what he says to be true is no justification if the words published are, as a matter of fact, false, and do not come within the classes of privileged communications above referred to. Furthermore, it is

no justification that libelous matter was published first by another. It is unlawful for one to repeat information received which is of a defamatory nature.

It was pointed out that where words are published imputing to another a crime or contagious disease, or which disparage him in his office or profession, the law will presume that special damage has in fact resulted from their use. If, however, words are spoken (not written) which merely impute fraud, dishonesty or vice, no recovery can be had without proof of special damages.

The publication of defamatory words entitles the party defamed to compensation for the actual injury done him without regard to the motive with which the publication was made. Want of actual intent to injure furnishes no legal excuse. Consequently it is no legal defense that the defendant was drunk when he uttered a slander or that the publication was the result of an honest mistake.

An untrue statement disparaging a man's goods, published without lawful occasion and causing him special damage, is actionable. This rule applies, although no imputation is cast on the plaintiff's private or professional character. In a leading case on this point the defendants falsely published a detailed analysis of the plaintiff's artificial manure and their own, in which the plaintiff's manure was much disparaged and the defendants' extolled. Special damage having resulted, the Supreme Court sustained the plaintiff's right to recovery. Where in another case a man wrote falsely that what another man sold as Turkish rhubarb was three parts brick-dust, the party whose goods were defamed was awarded damages. It is altogether proper for a man to commend his own goods or to advertise that he can make as good articles or even better than any other person in the trade. Competition between rival traders is allowed to any extent, so long as only lawful means are resorted to, but one should exercise care not to make false statements of the goods or property of another, for one renders himself just as liable if he slanders another's property as if he slandered his reputation.

Every one who requests, procures or commands another to publish a libel is as answerable as though he published it himself. One may be liable for publishing a libel which was composed by another, but merely composing a libel without publishing it is, of course, not actionable. To utter defamatory words in a foreign language is not a publication if no one present understands their meaning; but if defamatory words are written in a

foreign language there will be a publication as soon as ever the writing comes into the hands of anyone who does understand that language, or who gets them explained or translated.

A letter is not a publication until it is read by, or in the presence of, some third person. If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libelous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publishes it without authority he is from his own act the wilful circulator of slander. The sending of a letter containing libelous matter to the party defamed, where no third party hears or reads it, will not support a civil action. Sending a letter through the mail properly sealed is no publication, and the party sending it is not answerable for what the receiver may choose to do with it after it has once safely reached his hands. In this connection a certain case was recently decided where the defendant knew that the plaintiff's letters were always opened by his clerk in the morning, and yet sent a libelous letter addressed to the plaintiff, which was opened and read by the plaintiff's clerk in the usual course of business; the Court held that this was a publication by the defendant to the plaintiff's clerk. Words spoken by a husband to a wife not in the presence of any other person do not constitute a publication within the meaning of the law of slander. The maligning of the memory of a deceased person is not cause of action for damages in favor of his relatives where it does not affect their reputation. A corporation, although an artificial person, may maintain an action for defamatory words published of it concerning the trade or business in which it may be engaged. For words spoken of partners in connection with their trade, business or profession they may sue jointly.

Construction.

Words are to be understood in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed. In ascertaining the meaning of a speaker, reference is made to the words used and the circumstances under which they are uttered, and the author is presumed to have used them in the sense in which their use is calculated to convey to the minds of the hearers. In all cases of ambiguity the jury decides what meaning the words would convey to persons of ordinary intelligence. It is immaterial whether a slander or libel

be in the form of a question, whether the language is ironical, figurative or allegorical; the insinuation from the words used may be indirect and the allusion obscure, but if the meaning of the words has injuriously affected another, the party guilty of such slander or libel must pay the damages, even though the defamatory words be disguised in a riddle or in hieroglyphics. The intention of the speaker is immaterial. He may have meant one thing and said another; if so, he is answerable for so inadequately expressing his meaning. If a man in jest conveys a serious imputation he jests at his peril.

Malice is an important element in all cases of libel and slander, and may be defined as any dishonest motive which induces the defendant to defame the plaintiff. The law always presumes that in the publication of an article that is libelous upon its face, it was published with malicious intent. If defamatory words are written or spoken in the heat of passion or under excitement produced by the immediate provocation of the party defamed this circumstance will be taken into consideration in assessing damages. Where an apology is made and defamatory words retracted, it does not exonerate the party using such words from liability in damages, but such an apology will be considered in mitigation of damages. A minor over the age of fourteen may be guilty of slander or libel. A husband is liable for all libels published or slander uttered by his wife. A servant or agent will be liable for any slander uttered on his master's behalf or by his master's orders. In any suit for slander or libel the plaintiff's bad character may be proved in mitigation of damages.

Trespass, Nuisance, etc.

Acts of trespass, nuisance and kindred infractions of the rights of others happen almost daily in every community. We will therefore direct our attention briefly to an analysis of the important elements constituting these offenses, a clear recognition of which will afford a valuable safeguard to everyone.

Any interference, however slight, which unlawfully disturbs another in the enjoyment of his property is a trespass. A trespass may be committed whether the injury is wilful or not, if the injurious act is the immediate result of the force originally applied by the defendant, and the plaintiff is injured thereby; for example, where the defendant cut trees on his own land and one accidentally fell on the land of the plaintiff, the latter may maintain an action of trespass. It has been held, however, that it is not trespass

where an injury is caused by an altogether unavoidable accident. In a leading case an action of trespass was brought for driving against the plaintiff's horse and injuring him with the shaft of a gig; the Court held that it was a good defense to this action that the horse was frightened by the noisy and rapid approach of a butcher's cart and became ungovernable, so that the injury was occasioned by an unavoidable accident. Anyone engaged in the prosecution of a lawful act is not liable for an accidental injury occurring during the performance of the act, when due care and precaution have been exercised. It is a trespass if an injury results by frightening another's horse by firing off a gun, if there was reasonable ground to think that the firing of the gun might frighten the horse. In a case recently decided in Pennsylvania the defendant untied the plaintiff's horse, and removed him from the posts to which the owner had fastened him, and which the plaintiff's right to use, if not exclusive, was at least as good as the defendant's. The Court held that this act constituted a technical trespass, for which the plaintiff was entitled to recover damages.

In an action of trespass for entering plaintiff's house and removing a piano, it appeared that the plaintiff had hired it from the defendant who claimed to remove it for non-payment of rent. Plaintiff in this case kept his house locked against the defendant and he could not enter. In order to effect an entrance, this subterfuge was employed: an insurance agent, in the employ of the defendant, obtained admission upon pretense of examining the flues. Immediately afterward, defendant, with assistants, came to the house. Plaintiff's wife locked the front door against them, and requested the insurance agent to retire by the back door; instead of doing so and against her objections, he threw open the front door, and the defendant and his aids entered and removed the piano. Although the entrance had been effected peaceably, it was done through a deceit and the Court held those removing the piano liable in damages as trespassers.

One who aids, abets or incites in the perpetration of a trespass is liable as well as the direct perpetrator. Every man is liable for the consequences of his wrongful acts, even though the consequences might have been avoided by the exercise of care on the part of the injured person, and the liability is not lessened by the contribution to the result of any extraneous causes. A person can recover for the temporary interruption of his business and loss of time of his workmen occasioned by the blasting of rock by a contractor on a public work in the immediate vicinity of the

plaintiff's building in such a negligent manner as to throw pieces of rock against the building, and cause the plaintiff's workmen to leave them under a reasonable apprehension of danger. If one agrees to a trespass which has been committed by another for his benefit, trespass will lie against him although the act was not done in obedience to his command or at his request. To render one liable for a trespass, it is not necessary that he intended to do the particular injury which followed. In cases of trespass the law looks to the damage done rather than to the intent. A rather unique case illustrating the point just stated was decided recently in New York State. In this case the defendant ascended in a balloon which came down in the plaintiff's garden, and a crowd of people broke the fence into the garden to assist the defendant there in peril from being entangled, and trod down the vegetables and flowers in the garden. The Court held that the defendant was guilty of trespass and was liable for all damages done to the garden.

If a person commits a trespass against the person or property of another under a mistake, however honest, he is nevertheless liable for damages to the party injured. If a man cuts down trees on a church lot under instructions from persons whom he believed had the authority to regulate such things, he is liable for a trespass if the persons from whom he received his instructions had no such authority. In Pennsylvania the act of March 29, 1824, gives treble damages against "any person who shall cut down or fell, or employ any person or persons to cut down or fell, any timber, tree or trees growing upon the land of another, without the consent of the owner thereof." An important case arose under this act in which the agent of A entered into negotiations with B for the purchase of certain timber provided it stood on his land. B had a survey made which by mistake showed the timber to be upon his land, and the agent cut it down under a contract of sale by which he was to take it away within three years. The Supreme Court held that B was liable to the real owner of the land on which the timber stood.

A man's house cannot be entered forcibly for the execution of civil process. It may, however, be entered to execute criminal process. Each part of a house occupied in two parts by two families may be a separate house in the eyes of the law if it has two entrances. Everything in which the law recognizes property may be the subject of trespass.

Trespass may be committed on the highway, by anyone hav-

ing the use thereof, against the owner of the property bordering on such highway, or by such owner against the public. The term "highways," in this connection, includes streets, turnpikes, roads and railroads. When a highway is blocked, by reason of some sudden or unexpected obstruction, the public have the right to pass over adjoining property, to get around the obstruction, and those doing so are not guilty of a trespass.

Generally speaking, adjoining property owners have a right to a reasonable use of the highway for swinging doors, windows or overhanging eaves. This right, however, is usually regulated by local ordinances. Where a man owns land over which others have a right of way, the law gives him such property in the right of way as will support an action of trespass on his part. Where lots are conveyed by descriptions bounding them by an alley with a right of way over the alley in common with other owners of property abutting thereon, the title passes, unless there are express words of exclusion, to the center line of the alley, subject to the private right of way, and for any injury to the soil or property affixed thereto the owner in possession of the adjoining lot may sue for a trespass.

It is not necessary that a man should erect a tangible boundary to his property in order to give him a right to punish anyone trespassing thereon. Trees on the line and other monuments belong to each of the adjoining owners, in the absence of any special agreement to the contrary. The Supreme Court of Pennsylvania has decided that owners of adjoining land, with a division fence between them, built one-half by each, and established for more than twenty-one years, have not such an ownership in the materials of which it is made as will justify a removal by either of the portions built by him, against the consent of the other, and for such a removal an action of trespass will lie.

Fences are part of the freehold, even though they be accidentally detached from the soil. A fence built on the land of another belongs to him; if by agreement it is built on the boundary line, it belongs to both the adjoining owners.

Trespass may be committed by one who enters the land or property of another lawfully, but while on such another's premises does some unlawful act. One doing so becomes, to use a legal phrase, a trespasser *ab initio*; in other words he is held to be a trespasser from the time he entered the property of another. Where an act is lawfully done it cannot be made unlawful *ab initio* (from the beginning), unless by some positive act incompatible with the exercise of the legal right to do the first act.

That is, the mere intention of doing a subsequent illegal act will not render the first act unlawful.

Everything in which the law recognizes property may be made the subject of a trespass. A dog is a species of property, and an action of trespass will lie on the part of the owner against anyone injuring his dog. This principle, of course, applies in the case of all domestic animals or wild animals which have been reclaimed. A person may have a property in bees. Hiving or enclosing them gives a man property in them. It has been held that if a swarm of bees fly from the hive of the owner, his property or ownership therein continues only so long as he can keep them in sight, and possesses the power to pursue them. The owner may bring an action of trespass against a person who cuts down a tree into which the bees have entered on the soil of another and takes the honey.

The authorities hold that in the case of oysters planted by an individual in a bed clearly designated in a bay or arm of the sea, which is a common fishery, they are the property of the one who planted them, and who may sue anyone taking them for a trespass.

It is not necessary for the owner of property to show special damages in order to sustain an action of trespass. Ordinarily, however, the measure of damages is the actual value of the property destroyed, and such damages are given as a compensation to the damaged party for the injury done. The spirit which actuates a party committing a trespass enters largely into the question of damages. If no perceptible injury results from a trespass, nominal damages only are awarded.

Nuisances.

Closely akin to the subject of trespass is that of nuisances. The term "nuisance," which literally means annoyance, may be legally defined as any act which interferes with the lawful enjoyment of life or property by another.

A public nuisance is an act which affects the rights enjoyed by citizens as part of the public, that is, the rights to which every citizen is entitled; whereas a private nuisance is any damage, annoyance or detriment to the lands or property of another which does not amount to a trespass. For example, any unreasonable or unlawful use by a person of his own property which is an injury to another constitutes a private nuisance.

To constitute the condition or use of premises a nuisance some legal right, public or private, must exist, and some material

annoyance, inconvenience or injury must result from the invasion of that right.

There must be some such real damage as a sensible person if subjected to it would find injurious, regard being had to the situation and mode of occupation of the property injured. The motive of a person is immaterial, for where there is in fact a nuisance, the person causing the same is liable, although he did not act maliciously or with an intention of annoying his neighbors. It may be stated as a general principle of law that in order to constitute a legal nuisance the act of man must have contributed to its existence, and any injury which results from natural causes cannot become a nuisance. Any unlawful use by a person of his own property in such a way as to cause material injury to another or to the public generally constitutes a nuisance. The test applied to determine whether a business lawful in itself or a particular use of property constitutes a nuisance is the reasonableness of conducting the business or making use of the property complained of in the particular locality, and in the manner and under the circumstances of each particular case. A business which might be perfectly proper in a business or manufacturing neighborhood may become a nuisance when carried on in a residential district. In a leading case it was held that where defendant, a hotel proprietor, placed in his kitchen and used in his business a large cooking range, with a shaft for hot air which interfered with the comfort of plaintiff's house, by overheating his wine cellar, the plaintiff was entitled to an injunction to restrain the nuisance thereby caused to him.

The fact that a place is a manufacturing locality does not, however, justify an extraordinary use of property, introducing a serious annoyance in addition to those arising from the ordinary use of property; and no matter how lawful a business may be in itself, or how suitable in the abstract the location may be, the courts have held that these circumstances cannot avail to authorize the carrying on of a business which substantially damages the property of another, or causes unnecessary annoyance to persons in the vicinity.

It should be remembered that it is the character of the locality at the time of the annoyance complained of that governs. To illustrate, a locality which was originally residential may have lost that character and become a business or manufacturing neighborhood; and, consequently, the annoyance incident to such locality cannot be complained of by an old resident. On the other hand, the fact that an offensive trade or use of property

was originally established in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which and to persons passing which it is a nuisance. Cases of this character have arisen frequently, and a business man contemplating the construction of an establishment for the operation of a business should consider the effect which the nature of the business will have upon the locality in which it is situated. No definite rule can be given to govern all cases, as every case must depend upon the particular circumstances which characterize it. The Supreme Court of Pennsylvania, in a comparatively recent case, decided that where the defendants are charged with maintaining a public nuisance by operating an oil refinery in a city, which emitted offensive vapors, and in which were stored inflammable and dangerous oils and gases, the character of the location where the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested and the influence of the business on the growth and prosperity of the community are proper matters to consider in determining whether or not it is a public nuisance.

A person who lives in a city or large town must of necessity submit himself to the consequences and obligations of the occupations which may be carried on in his immediate neighborhood, which are necessary for trade and commerce and also for the enjoyment of property and the benefit of the inhabitants of the place. But although people live in cities they are entitled to enjoy their homes free from damaging results by smoke, soot, etc., sufficient to depreciate the value of their property, or render their occupancy uncomfortable.

A business which, when properly conducted, would give no legal ground of complaint may become a nuisance through being conducted in an improper manner or carried on at unreasonable hours, so as to cause unusual or unnecessary annoyance to another. If a particular use of property causes a nuisance, this fact is sufficient to entitle a person injured thereby to redress.

A nuisance cannot be justified by the existence of other nuisances of a similar character, if it happens that the inconvenience is increased by the nuisance complained of.

There is a very marked distinction to be observed in reason and equity between the case of a business long established in a particular locality, which has become a nuisance from the growth

of population and the erection of dwellings in proximity to it, and that of a new erection or business threatened in such vicinity. It requires a much clearer case to justify a Court of Equity in interfering by injunction to compel a person to remove an establishment in which he has invested his capital and been carrying on business for a long period of time, than would be required to prevent the establishment of an objectionable business by one who comes into the neighborhood proposing to establish such a business for the first time, and who is met at the threshold of his enterprise by a remonstrance of the inhabitants. If a person moves into a town or neighborhood where, by reason of the industries established, certain annoyances prevail, he will have no right to restrain the continuance of such industries. It has been decided that the purchaser of land near an existing cemetery, although aware that the same is a nuisance, is not bound to submit to the nuisance created by an enlargement of the cemetery. Where a tenant knows of the existence of a nuisance affecting the value of property when he leases it, he has no right thereafter to complain of it or recover damages therefor, provided the nuisance is not increased during the term of his lease.

The mere fact that an act is prohibited by law does not render the doing of such act a nuisance; and where a building or structure is not in itself obnoxious or dangerous, the fact that it is constructed in violation of a city ordinance does not render it a nuisance which would entitle the owner of adjoining property to obtain an injunction.

The courts have held that the playing of the game of baseball is not a nuisance to the owner of property adjoining the place where it is played. If in conducting a baseball game spectators habitually trespass on the grounds of another, profane language be indulged in, or the property of another be damaged by flying balls, it is, of course, a nuisance, which may be enjoined. The constant barking and howling of dogs is regarded as a nuisance, and everyone injured in this manner may obtain relief by an action at law. A billiard or poolroom is not of itself a nuisance, but may become such where it causes annoyance and disturbance and injuriously affects property interests in the vicinity. A carpet-cleaning establishment in a thickly-settled neighborhood of private residences is a nuisance when the dust and moths from it permeate the neighboring houses. Blasting operations, excavations and the manufacture and storage of explosives are nuisances unless every safeguard (which a prudent man could

adopt to prevent injury to adjacent property owners) is used. The placing of any object on the highway which is calculated to frighten horses is a nuisance and may be enjoined.

In Pennsylvania it is made a crime under the act of March 31, 1860, for anyone to maintain a common or public nuisance, the penalty for which is a fine and imprisonment or either, at the discretion of the Court under the circumstances of the case.

The variety of acts and omissions which may constitute a nuisance is so great as to render an enumeration impossible; no particular combination of sources of annoyance being necessary to constitute a nuisance, and the possible sources of annoyance not being exhaustively defined by any rule of law.

The injury, or annoyance, which will warrant relief against an alleged nuisance must be of a real and substantial character. If the injury or inconvenience be slight or trivial or fanciful, or one of mere delicacy or fastidiousness, there is no nuisance in a legal sense. Thus the law will not declare a thing a nuisance because it is unsightly or disfigured, or because it is not in a proper and suitable condition, or because it is unpleasant to the eye and a violation to the rules of propriety and good taste; the law does not cater to men's tastes or consult their convenience merely, but only guards and upholds their material rights and shields them from unwarrantable invasion. The question in all cases is whether the annoyance produced is such as can materially interfere with the ordinary comfort of human existence.

The person primarily liable for a nuisance is he who actually creates it, whether on his own property or not; one who, either by negligence or design, furnishes means and facilities for the commission of an injury to another which could not have been done without them is equally responsible with the immediate wrongdoer, as all are regarded as principals in maintaining a nuisance. Consequently one who merely contributes to the creation of a nuisance is liable therefor, although it has been held that such a person is liable in damages only for that injury or loss which is direct and proximate result of his acts. Anyone who permits the establishment of a public nuisance upon property under his control is liable therefor. A person cannot escape liability for the maintenance of a nuisance on the ground that in so doing he acted only as the agent of another.

If a man erects a nuisance on his land, he cannot escape liability for damages caused thereby by a conveyance of the property; and his liability extends to a continuance of the nuisance subsequent to his conveyance, where he is shown to

derive some benefit from its continuance. Likewise one who erects a nuisance on his premises cannot escape liability by leasing the same; and his liability extends to the continuance of the nuisance after the lease goes into effect. A tenant in possession is liable for a nuisance on the premises which is due to his act or failure of duty, and the landlord is not liable for damages which result from a nuisance which it is the tenant's duty to remove or repair. One who leases property for a purpose which must prove injurious or offensive to others is liable for the injury resulting therefrom.

It is well recognized in law that all persons concerned in the creation or commission of a nuisance are liable for damages.

Remedies for Nuisances.

The remedies for nuisances are threefold; preventive, compensatory and punitive. The first is again divided into the remedy by abatement, without process of law, and by injunction. The compensatory remedy is an action at law for damages, while the punitive remedy is in the nature of an indictment on behalf of the public.

The most efficient and flexible remedy is that of injunction. Under this form the Court can prevent that from being done which if done would cause a nuisance; it can command the destruction of buildings or the cessation of works which violate a neighbor's rights; where there is a disputed question of right between two parties the Court can suspend the operations complained of until that question is finally decided. Furthermore, the orders of the Court may be either absolute or conditional upon the fulfilment by either or both of the parties of such undertaking as appear to the Court just in the particular case.

In order to obtain an injunction against a nuisance, it must be shown that the injury complained of, as present or impending, is such as by reason of its gravity or its permanent character cannot be adequately compensated in damages. The injury must be either irreparable or continuous. The remedy by injunction is, therefore, not appropriate for injuries which are temporary or intermittent, or accidental and occasional, or for an interference with legal rights which is trifling in amount and effect. Long acquiescence in the existence of a nuisance will forfeit the right to apply to a Court of equity to stop the same by an injunction.

A public nuisance does not furnish grounds for an action either in law or equity by an individual who merely suffers an injury which is common to the general public. However, an

individual who sustains an injury peculiar to himself may have relief against a public nuisance and is entitled to proceed in equity for the abatement of, or an injunction against, such nuisance, or he may maintain an action at law for damages on account of the special injury which he has received. The number of persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance, and the fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief.

It is well established that a person who is aggrieved by a private nuisance has the right to abate the same by his own act without instituting any legal proceedings. On this principle a person may kill a dog which haunts his premises and by barking and howling becomes a nuisance; one may cut off branches of a neighbor's trees overhanging his land, remove a part of an adjoining owner's wall which overhangs his premises, or cut off the eaves of a building overhanging his property.

To justify a person in abating a nuisance by his own act, the nuisance must cause a particular injury to his person or property at the time when he undertakes to abate it. It should be borne in mind that the remedy of abatement by the act of the person injured should be resorted to within a reasonable time after the creation of the nuisance, as the right to so abate may be lost by acquiescence in the injury for a considerable time. Where a nuisance can only be abated by going on the land of another person, from which the nuisance proceeds, the person desiring to abate the same must give previous notice to the owner of the land to remove the nuisance. Where one proposes to abate a nuisance merely by doing acts upon his own land, without trespassing upon the land of his neighbor, no previous notice to abate the nuisance is necessary.

A person abating a nuisance must not in so doing be guilty of any excess, or inflict any unnecessary injury. If a person assumes to be the judge in the first instance as to the existence of a nuisance, when he undertakes to abate the same, without legal proceedings, he acts at his peril and assumes all liability for exceeding his legal right. Such a person could be held liable in damages if it is proven that what he destroyed was not a legal nuisance so injuring him as to give him the right to abate it. It is consequently inadvisable for any one to attempt to personally abate a nuisance unless the circumstances of the case relieve it

from all doubt. The person responsible for a nuisance may be held liable for the expense of removing it.

Where there is danger of irreparable injury resulting from a nuisance, a Court of equity may order a preliminary injunction, restraining the defendant from creating or continuing the nuisance until complainant's right to relief can be thoroughly investigated and disposed of. If injuries result from a nuisance permanently affecting real estate the measure of damages is the difference between what the property would have sold for before and after the injury. For nuisances affecting health and personal comfort, injury sustained not only by the plaintiff, but also by members of his family, whom he is bound to support, is a proper element of damage. It is well established that anything which is authorized by the Legislature cannot be a nuisance. By this, however, a public nuisance is meant, and there may be, notwithstanding the legislative authority, a private right of action for damages. To hold otherwise would be to hold in effect that one's property may be taken without compensation, which is clearly contrary to the Constitution.

Malicious Prosecution.

Public policy has always favored prosecutions for crimes, and affords such protection to the citizen causing the prosecution of another in good faith and on reasonable grounds as is essential to public justice, without the sacrifice of the right of the individual. Likewise free access to courts of civil jurisdiction is provided in every State for the administration of the law of the land. An action for malicious prosecution does not lie merely because a suit has been brought either criminally or civilly and has terminated unsuccessfully. However, the right of one person to bring an action against another has been so seriously abused that it has become necessary to restrict this right in order to safeguard individual liberty. Consequently where either a criminal or civil proceeding has been commenced or continued without probable cause, but with malice, and has terminated unsuccessfully, the injured party may recover damages which he has sustained to his person, property, or reputation as the result of the wrongful institution of such legal proceedings.

Elements of Action.

In order that an action for malicious prosecution may be maintained three elements must concur: (1) The motive of the

party instituting the original proceedings must have been malicious; (2) the suit or proceeding complained of must have been instituted without any probable cause; (3) the suit or proceeding must be terminated. Everyone is in duty bound to act fairly, honestly and without malice toward every other one. This is a moral duty, but becomes a legal and concrete one when the machinery of the law is called into motion. It is for the infraction of this duty that the action for malicious prosecution lies. By the term "malice" is meant any indirect motive of wrong. In a legal sense, any unlawful act which is done wilfully, and purposely to the injury of another, is, as against that person, malicious. It is an action based upon an improper motive, and does not necessarily presuppose hatred, ill will or revenge. It may be a mere wanton or careless disregard for the rights of others, or the doing of the acts complained of without that ordinary prudence and discretion which persons of sufficient age and sound mind are presumed to have. If probable cause existed for the bringing of a legal action the motive becomes immaterial.

As we have seen, in order that an action for malicious prosecution may be maintained, the plaintiff must show that the defendant had no probable cause for the commencement or continuation of the proceeding complained of. Probable cause has been defined as that reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused or sued is guilty of the offense or wrong charged. It has been held that the mere knowledge and consent of one partner that another partner should have a person accused of defrauding the co-partnership arrested would not render the partner, so knowing and consenting, liable to an action for malicious prosecution. It is necessary that the consent should be of such a character as to amount to advice and co-operation. There is, however, respectable authority holding to the contrary of this rule. Corporations are liable for malicious prosecution to the same extent that individuals are liable under similar circumstances. It is generally conceded that a person who, after consulting counsel in good standing and fully disclosing the facts of his case within his knowledge, acts upon the advice of such counsel, is not liable in a suit for malicious prosecution for bringing such action. The advice of counsel must, however, be sought and followed in good faith and not as a subterfuge. It is no defense to act under the advice of a justice of the peace in suing another.

BUILDING AND LOAN ASSOCIATIONS.

*Development—Classification—Method of Business—Membership
—Withdrawals—Termination.*

SO closely interwoven are building and loan associations with the business prosperity of the community that it is thought a discussion of the legal principles regulating their operations will be both interesting and profitable.

A building and loan association is an organization created for the purpose of accumulating a fund from the monthly subscriptions or savings of its members to assist them in building or purchasing for themselves dwellings or other real estate, by loaning to them the requisite money from the funds of the society, upon good security. The primary design of building associations is to encourage the acquisition of real estate, the building of dwellings, the ownership of homesteads; to increase the proportion of property holders among that class of the population whose slow and laborious earnings are by reason of their pettiness most fugitive, and generally spent before they reach a sum sufficient to back a desire for those guarantees of good citizenship which the policy of our law has always found in landed property. That is the class for whose benefit building associations were originated; from among whose number their membership was, and for the most part is, still drawn; and all the incidents of membership were designed to accommodate their necessities and intended to serve their purposes.

The earliest authentic information regarding building societies fixes their origin in Great Britain about the end of the eighteenth or beginning of the nineteenth century. They first appeared in the United States about the year 1831, since which time they have multiplied until they now number many thousands. The accumulation by the members of a building and loan association of their money by periodical payments into its treasury, to be invested, from time to time, in loans to members upon real estate for home purposes, is the basic idea of the class of associations under consideration. The borrowing members pay interest and a premium as a preference in securing loans over other members, and continue their fixed periodical installments in addition, all of which payments, together with the non-borrowers' payments, including fines for failure to pay such fixed install-

BUILDING AND LOAN BOND AND MORTGAGE

Know all Men by these Presents, *That*

(hereinafter called the Obligor),
held and firmly bound unto

(hereinafter called the Obligees),
in the sum of _____ Dollars,
lawful money of the United States of America, to be paid to the said
Obligees, their certain Attorney, Successors or Assigns. To which
payment well and truly to be made, _____ do bind
Heirs, Executors and Administrators, and every of them, firmly by
these presents. Sealed with _____ Seal . Dated the _____
day of _____ in the year of our Lord
one thousand nine hundred and _____

The Condition of this Obligation is such, That if the above bounden Obligor Heirs, Executors and Administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above named Obligees, their Attorney, Successors or Assigns, the just sum of Dollars, such as abovesaid, at any time within year from the date hereof, together with interest for the same in like money, payable monthly, and together with all fines imposed by the Constitution and By-Laws of the aforesaid Association, and a monthly premium of for the same, in like money, payable monthly, on the of each and every month hereafter, and shall also well and truly pay, or cause to be paid, unto the said Obligees, their Successors or Assigns, the sum of

Dollars, on the said _____ of each
and every month hereafter as and for the monthly contribution on
Share of the Capital Stock of the said
Obligees, now owned by the said Obligor, without any fraud or
further delay; and shall also deliver to the said Obligees, their
Successors or Assigns, on or before the _____ day of
_____ of each and every year, receipts for all

taxes of the current year assessed upon the premises described in the accompanying Indenture of Mortgage; and also from time to time and at all times until payment of the said principal sum, keep the building mentioned in the said Mortgage insured against loss or damage by fire for the benefit of the Mortgagees in the sum of

Dollars. **Provided**, however, and it is hereby expressly agreed, that if at any time default shall be made in the payment of the said principal money when due, or of the said interest, or of the said fines, or of the said monthly premium, or the monthly contribution on said Stock, for the space of _____ months after any payment thereof shall fall due, or in such delivery to the said

Obligees, their Successor or Assigns, on or before the day of
of each and every year, of such receipts
for the taxes of the current year upon the
premises mortgaged, or in the maintenance of such insurance, or if
the said Obligor shall not well and truly pay or cause to be paid,
the taxes, on the premises particularly
described in the Mortgage accompanying this Obligation, when the
same shall become due and payable, and also shall not well and
truly pay, or cause to be paid, all and every such sum or sums as
shall hereafter be assessed by any public authority upon the said
principal debt or sum, or upon the interest thereof, then and in such
case, the whole principal debt aforesaid shall, at the option of the said
Obligees, their Successors and Assigns, immediately thereupon become
due, payable and recoverable, and payment of said principal sum,
and all interest, and all fines, and all monthly premiums due thereon,
as well as any contribution on said Share of
Stock then due, may be enforced and recovered at once, anything
hereinbefore contained to the contrary thereof notwithstanding. And
it is hereby further agreed, that if the same, or any part thereof, has
to be collected by proceedings at law, then an Attorney's fee of
per cent. shall be added to and collected as a part of the
costs of such proceedings, besides all expenses of effecting such
insurance. And the said Obligor for
Heirs, Executors, Administrators and Assigns, hereby expressly
waive and relinquish unto the said Obligees, their Successors and
Assigns, all benefit that may accrue to by virtue of
any and every law, made or to be made, exempting the premises
described in the Indenture of Mortgage herewith given, or any other
premises or property whatever, from levy and sale under execution,
or any part of the proceeds arising from the sale thereof, from the
payment of the moneys hereby secured, or any part thereof, and the
cost of such action and execution; then the above Obligation to be
void, or else to be and remain in full force and virtue.

Sealed and Delivered
IN THE PRESENCE OF US:

To Esquire, Attorney of the Court
of Common Pleas, at in the County of in
the State of to any other Attorney, or to the
Prothonotary of the said Court, or of any other Court, there or
elsewhere.

Whereas,

in and by a certain Obligation, bearing even date herewith, do stand
bound unto

in the sum of
Dollars,

lawful money of the United States of America, conditioned for the payment of the just sum of Dollars, such as abovesaid, at any time within year from the date thereof, together with interest

for the same, in like money, payable monthly, and together with all fines imposed by the Constitution and By-Laws of the aforesaid Association, and a monthly premium of

for the same, in like money, payable monthly, on the of each and every month thereafter, and should also well and truly pay, or cause to be paid, unto the said Obligees, their Successors or Assigns, the sum of

Dollars, on the of each and every month thereafter, as and for the monthly contribution on

Share of the Capital Stock of the said Obligees, now owned by the said Obligor, without any fraud or further delay; and should also deliver to the said Obligees, their Successors or Assigns, on or before the day of of each and every year, receipts for all taxes of

the current year assessed upon the premises described in the Mortgage accompanying said Obligation, and also from time to time and at all times until payment of said principal sum, keep the building

mentioned in the said Mortgage insured against loss or damage by fire for the benefit of the Mortgagees in the sum of Dollars.

Prohibited however, and it is thereby expressly agreed, that if at any time default should be made in the payment of the said principal money when due, or of the said interest, or of the said fines, or of the said monthly premium, or the monthly contribution on said Stock, for the space of months after any payment thereof shall fall due, or in such delivery to the said Obligees, their Successors or Assigns, on or before the day of of each and every year, of such receipts

for the taxes of the current year assessed upon the premises mortgaged, or in the maintenance of such insurance, or if the said Obligor shall not well and truly pay, or cause to be paid, the

taxes, on the premises particularly described in the Mortgage accompanying said Obligation, when the same shall become due and payable, and also shall not well and truly pay, or cause to be paid, all and every such sum or sums as should thereafter be assessed by any public authority upon the said principal debt or sum, or upon the interest thereof, then and in such case, the whole principal debt aforesaid should, at the option of the said Obligees, their Successors and Assigns, immediately thereupon become due, payable and recoverable, and payment of said principal sum, and all interest, and all fines, and all monthly premiums due thereon, as well as any contribution on said

Share of Stock then due, might be enforced and recovered at once, anything thereinbefore contained to the contrary thereof notwithstanding.

And it is thereby further agreed, that if the same, or any part thereof, has to be collected by proceedings at law, then an Attorney's fee of per cent. should be added to and collected as a part of the costs of such proceedings, besides all expenses of effecting such insurance. And the said Obligor for

Heirs, Executors, Administrators and Assigns, thereby expressly waived and relinquished unto the said Obligees, their Successors and Assigns, all benefits that might accrue to

by virtue of any and every law, made or to be made, exempting the premises described in the Indenture of Mortgage therewith given, or any other premises or property whatever, from levy and sale under execution, or any part of the proceeds arising from the sale thereof, from the payment of the moneys thereby secured, or any part thereof:

These are to desire and authorize you, or any of you, to appear for Heirs, Executors or Administrators, in the said Court or elsewhere, in any appropriate action, there or elsewhere brought or to be brought against

Heirs, Executors or Administrators, at the suit of the said Obligees, their Successors or Assigns, on the said Obligation, as of any Term or Time past, present, or any other subsequent Term or Time, there or elsewhere to be held, and confess or enter Judgment thereupon against

Heirs, Executors or Administrators, for the sum of Dollars, lawful money of the United States of America, debt, besides costs of suit and all expenses of effecting insurance as aforesaid, by Non sum informatus, Nihil dicit, or otherwise, as to you shall seem meet: and for your or any of your so doing, this shall be your sufficient warrant. And do hereby, for

Heirs, Executors and Administrators, remise, release, and forever quit claim unto the said Obligees, their certain Attorney, Successors and Assigns, all and all manner of Error or Errors, Misprisions, Misentries, Defects and Imperfections whatever, in the entering of the said judgment, or any Process or Proceedings thereon or thereto, or anywise touching or concerning the same.

In Witness Whereof,
and Seal the day of
thousand nine hundred and

have hereunto set Hand
in the year of our Lord one

Scaled and Delibered
IN THE PRESENCE OF US

}

ments, forfeitures for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of a member into the society go into the common fund until such time as that the installment payments and profits aggregate the face value of all the shares in the association, when the assets after payment of expenses and losses are pro-rated among all members, which in legal effect cancels the borrower's debt and gives the non-borrower the amount of his stock.

Three Varieties.

The building association exists in three varieties—the terminating, the permanent and the serial. The first mentioned is seldom found at the present date and consequently will not be discussed. The permanent building association is a society which has not fixed any date or specified result at which it shall terminate. It differs from a terminating society chiefly in the fact that a person may become a member at any time without paying any back subscriptions. Serial associations instead of issuing all their stock to the full extent allowed by law at once divide it up into series and issue each series successively, each class or series being then treated to a certain extent as a separate association distinct from the others, but with them sharing in the profits of the concern. Permanent associations usually adopt the serial plan—that is, an association is incorporated with a specified capital (usually one million dollars) and the stock divided into series. It is provided by the law of Pennsylvania that in dividing the capital stock into series that no such series shall at any issue exceed in the aggregate five hundred thousand dollars. These series may be issued monthly, quarterly or annually, according as the promoters think desirable. Perpetual charters may be obtained under the statute law in most of the States.

Two Classes of Members.

In the development of building and loan associations it was seen that these societies really consist of two classes of members; that those who do not care to have, or have not received, an advance upon mortgage security are mere investors, and that it matters little when they commence investing or in what amount, while those to whom advances have been made are really debtors to the society, and arrangements for enabling them to pay off their debt in various terms of years according to their convenience

would be of advantage both to themselves and the society. By permitting members to enter at any time without back payment, and by granting advances for any term of years agreed upon a continuous inflow of funds and a continuous means of profitable investment of such funds would be secured. The interest of each member of the society would terminate when his share was realized or his advance paid off, but the society would continue with the accruing subscriptions of other members employed in making other advances. The successive serial issues of stock constitutes its permanent feature, for, although the membership of any individual terminates with the series of stock in which that membership is claimed, yet the association continues on until the last series is wound up.

In "The Working Man's Way to Wealth" the author emphasizes the advantages of the serial association as follows: (1) That it allows a person wishing to become a member to avoid back payments by purchasing stock in the last series: (2) that by loaning the surplus funds of the elder series to the members of the younger a profitable investment can always be insured. When the fact is recalled that the chief trouble in the successful working of the terminating plan arises from the difficulty of obtaining new members, owing to the heavy back payments necessary to equalize them with the first members after the association has reached its third or fourth year, the consequent falling off in the number of stockholders by reason of death or withdrawal, and the difficulty thereby occasioned of finding proper investments for the large sums of money which accumulate upon the hands of the society, the immense practical importance of this feature of the serial system cannot be overestimated.

Method of Business.

The par value of the stock is fixed by charter or by-law (usually two hundred dollars per share), and each member of the society binds himself on becoming a member to pay a subscription at stated intervals, until the amount in the treasury produced by the sum total of all the subscriptions, together with the profits, is such as will enable the society to pay to each member on every share of stock the par value of that share. Whenever the amount in the treasury at any time equals the par value of one or more shares, that sum is put up at auction, and that member obtains the loan who offers the highest premium, or, in other words, agrees to accept the smallest sum at the time of making

the loan in lieu of the par value of his stock at the final distribution.

The borrower continues a member and gives adequate security for the payment of interest on his loan, together with subscription and charges. On the final distribution of the stock those members who have not become borrowers receive the par value of their shares in cash, while borrowing members get back their bonds and mortgages receipted in full. To secure prompt payment of interest and dues a system of fines and forfeitures is adopted, which at once makes it the interest of the member to discharge his obligations to the society and compensate the latter for the loss of the interest upon the amount due.

The following illustration, it is hoped, will conduce to a clearer understanding of the practical workings of a building and loan association: Suppose that there are a hundred men able to save five dollars out of their monthly earnings. They agree for the purpose of united action and mutual encouragement to put their money together upon fixed days every month, until the whole aggregate shall be sufficient to pay to each of the hundred associates one thousand dollars in cash. It is clear that if all are prompt in their payments the treasure will be ready for division at the end of two hundred months; in other words, letting each monthly payment of one dollar represent a share in the common fund, each share will, at the end of two hundred months, be worth a fixed par value of \$200. This period, however, will be shortened if, after each monthly collection of \$500 has been made, that sum is at once put out at interest, upon some safe investment, with the addition of the interest, etc., accruing to the fund. The distribution of \$200 to each share may be feasible in, say, one hundred and eighty months, when each associate has, in fact, paid only \$180 on each of his five shares—that is, has paid in \$900 up to the time when he is entitled to receive \$1,000. Thus far, we have only co-operative savings fund, the stated payments being periodical and compulsory. But the persons who started this association idea had an object beyond the mere saving of money; they desired through it to acquire houses or homes; when, therefore, the question of investing the money arose, it was found that it might be made the means of securing to some of the members particularly anxious to become their own landlords the property upon which they wished to build, and the money to defray the expenses of building, they paying the interest upon the amount loaned them. In this way the money which belonged to all would assist the individual, and he, while

he continued to pay his installments, would in paying interest on the money advanced to him in fact be paying it in part to himself, and would himself help to hasten the day when he would be entitled to participate with the others in the distribution of the common funds, his share in which might then at once be devoted to the extinguishment of the loan he had received. Thus, he could get his house perhaps a number of years before his monthly payments of five dollars could be expected to amount to a sum sufficient to pay for it; and yet those small payments, being kept up by him, would in time equal the sum he had borrowed, and he would have his house free, virtually paying for it in installments of five dollars monthly and the interest on the amount he had borrowed. Such a bargain he could get nowhere else; and it stands to reason that more than one member should endeavor to obtain the advantage of being able to pay so gradually for his house and yet have it all his very own. Hence, whenever there is a sum of money ready for investment there will probably be a number of applicants, and it will be a matter of embarrassment to know to whom to give the loan. But this awkwardness is again turned into a source of profit. Among those who apply there will be some to whom, for various reasons, the accommodation will be of considerably more moment than to others. It will be worth more to some than to the rest, and this difference will probably be capable of expression in dollars and cents. The loan, therefore, is put up at a sort of auction. Various members desirous of obtaining it bid against each other for the preference, agreeing that they will receive the sum offered, less the amount bid by them. This difference is called the premium, or bonus, which he undertakes to pay, together with the amount actually received by him, the two constituting his whole debt, to be discharged in the same manner and at the same time. It is a rule with building societies that a member's indebtedness by loan shall not exceed the paid-up value of the number of shares he holds in the association.

Sources of Profit.

The sources of profit relied upon by building and loan associations are interest on the loans to members, premiums and fines. The fact that the money so obtained is at once reinvested, and in like manner the interest derived therefrom, and so on, enables the non-borrowing member to realize compound interest on his subscription; while to one wishing to become a borrower the fact that the loan can be repaid in small monthly installments,

and that the sum advanced is greater than private individuals would be willing to lend on the same security, offers substantial advantages. This the association can do without risk, since as each installment is paid the security is by that much increased; thus property which at first might well seem inadequate security will at the end of six months be ample. To the workingman, above all, do these societies when honestly conducted commend themselves, in that their management is perfectly democratic, and that they have no preferred class to share its profits, no heavy sinking fund to create and hold in reserve against possible contingencies, and in that it is the only plan by which he can become his own capitalist and create a source of wealth from which he can supply all reasonable demands, without the aid or interference of the outside capitalist. As Chief Justice Sharswood said in the course of a Supreme Court opinion: "However it may be elsewhere, Philadelphia has become a city of comfortable homes for the poor by means of these organizations."

At the present time shares in a building and loan association mature in about eleven years and six months, depending on their conservative management. Some of these associations have earned eleven per cent. profit.

A marked feature of a building and loan association is the mutuality of the system upon which its business is regulated. If for example one man lent another \$800 upon an agreement that the latter pay him \$1,000 in monthly installments of twenty dollars in addition to legal interest upon the amount received, the contract would be clearly usurious. Still less inviting would the arrangement appear if the obligation of the unhappy debtor was enforced by an elaborate system of fines and forfeitures. There must, therefore, be something peculiar to the building association loan by which the debtor receives something in return for the liabilities which he assumes, and by which the transaction, though apparently usurious and oppressive, is really rendered equitable and mutual. The mutuality lies in the fact that after the loan, the borrower still retains his membership in the association and all the rights and privileges belonging thereto; he stands to the association in the twofold relation of debtor and member. As debtor, he is bound to pay premium, interest and dues; as member he has a proportionate interest to the extent of his stock in his own payments; and whatever profit the association may derive from their future investment redounds to his own advantage by hastening the day of final settlement, and thereby shortens the time during which the payments must be continued. He is inter-

ested in his subscriptions both at the time of payment and at the final settlement and hence in principle, to quote the expressive language of Judge Sharswood: "The borrower at usury is himself also a lender at usury."

Having pointed out the system under which building and loan associations are conducted, let us direct our attention briefly to their general powers and liabilities.

Building associations possess all the attributes of corporations. Whether any particular power is implied in the charter depends on whether its exercise would be conducive to the accomplishment of the legislative intent in creating the corporation. A building and loan society has no power to make by-laws which are inconsistent with the law of the land, its charter, or the statute under which it was created. A member is charged with notice of the association's by-laws and is bound by such of them as are not repugnant to the rule just stated.

Members of a building association are liable by virtue of their membership for subscriptions, stock payments or dues; for fines and forfeitures, and for contribution to the losses and necessary expenses of the organization. This rule applies to a borrower as well as to a non-borrower.

Membership.

It may be stated as a general rule that any person capable of entering into a contract may become a member of a building association by becoming the holder of its stock. In the absence of expressed statutory authority, neither infants nor married women can become members. In Pennsylvania a married woman may become a member of a building and loan association. Certificates issued by a building society, conforming to the description of stock mentioned in the by-laws, and in the statute under which the society was organized, and on which dividends are to be paid out of the profits, are certificates of stock, and the holder thereof is a member subject to all the liabilities imposed by the by-laws or statutes.

Failure of a member to sign the constitution, if he has acted as a member for a long time, will not prevent the association from enforcing a contract with him which it was authorized to make with none but a member. Independently of expressed statutory authorization, a corporation cannot become a member of a building and loan association. In most States, however, certain corporations are permitted to become members. The executor

or administrator of a deceased member does not become a member, nor will a suit brought by him to enforce a liability of the society to the decedent, or an attempt to avail himself of the privileges of membership, render him such. If, however, he takes advantage of a rule allowing him to become a member, and is recognized as a member by the association, the relationship is created. In all dealings between the association and its members the stock book is evidence of membership.

The by-laws regulating the rights and liabilities of members differ to a limited extent in the various associations, but the general principles are about the same. A member who is not in arrears in the payments of his installments is entitled to a loan on his stock, where such loan has been duly applied for, and the association is in funds properly applicable to that purpose. Each member in good standing is entitled for each share held by him to the same amount of the assets. A member may enforce an accounting by the association of profits where the association has abrogated charter provisions to his injury and without his consent. A member may sue the association to restrain any unlawful action by it, notwithstanding he has pledged his stock as collateral to a loan; where each shareholder is entitled to one vote for officers, every voter must be the holder of at least one share of stock.

Subscriptions, stock payments or dues may be defined as the fixed periodical contributions upon each share of stock held which by virtue of the original undertaking of membership in the society the holder thereof is liable to pay, whether he remains an investor or becomes a borrower. The undertaking is absolute and the misbehavior of other members, such as their refusal to live up to their engagements, their persistent and deliberate default in the payment of dues, will not excuse similar conduct on the part of any particular one, nor relieve him of his liability to the association for his stipulated stock payments. In fact the association may maintain an action of assumpsit against a member for his dues, and it is not necessary that it should give the member notice of his delinquency. A statutory direction to corporations generally to give notice to members of calls upon unpaid subscriptions does not apply to a corporation under whose by-laws the subscribers to its stock are under a continuing requirement to pay a periodical installment of a fixed amount on each share. Hence, it has no application to a building and loan association.

The statutes in most States regulating building and loan associations generally give them a lien upon the defaulting mem-

ber's shares for the amount of the unpaid installments and other charges and liabilities of membership.

To secure the prompt payment of dues, fines are imposed upon delinquent members, and the members may even be made liable to forfeiture of stock. Fines may be defined as impositions in the nature of liquidated damages upon members neglecting to pay at the proper time to the society any moneys which are due to the latter from them. They are essentially an incident to membership in the association, the direct outgrowth of the obligation resting upon every shareholder, regularly and punctually to pay the dues accruing periodically upon his stock. If a member obtains a loan from the association, not only may his mortgage or deed of trust be made to secure the payment of dues, but fines also.

Dues and fines are payable in cash, and the treasurer has no right, and cannot be authorized by the officers, to receive anything but cash in payment thereof. The power to impose fines depends upon authority conferred by statute, and in the absence of such authority they cannot be enforced, and if paid by a borrower may be set off from the amount due by him to the association. Fines cannot be collected at all unless they are imposed by charter or by-law, and when so imposed they must be certain and notorious. If the by-law imposing them admits of several constructions, the Court will adopt that most favorable to the member and least favorable to the association. Fines must be reasonable and a second fine cannot be imposed for non-payment of the same dues, and interest cannot be charged upon fines. The proper measure of fines is the real damage the building association sustains from the failure of a member to pay his dues, which damage is really equal to interest upon the amount, together with the proportion coming to it from the then obtainable premiums upon the sale of money. The fines should be slightly in excess of this, so as to make it more profitable to the member to pay promptly than to lag behind.

In addition to fines, the rules of most societies establish a limit beyond which indulgence cannot be claimed by derelict members, by providing for the forfeiture of their shares, when that limit is exceeded. Such rules not imposing too short a period of grace have expressly, upon general principles of law, been held reasonable and within the legal power of building and loan associations.

As in the case of fines, so also in the case of forfeitures it is necessary that the causes of their occurrence should be distinctly defined by by-law, and the method of their enforcement,

as there pointed out, must be exactly followed. Forfeiture of stock is necessary forfeiture of membership and when it takes place the obligation to continue the payment of dues, the consequence and necessary incident of membership, is at an end.

Intimately connected with the matter of forfeitures of stock on default of members is the question of accelerating payment for a like cause. A provision in a mortgage to secure an advance that in case of failure to pay the prescribed contribution, interest, dues or fines, for a time specified, the whole sum advanced, together with all dues and fines owing by the mortgagor, shall be deemed due, and may be collected, is lawful.

Every member, being equally entitled with all the others in the direct ratio of his interest in the society, to share in the common gains of the enterprise, is liable to contribute in the same proportion in which he expects to profit, to the losses and expenses incident to its management. The Supreme Court of Pennsylvania has held that a member cannot evade such liability by a transfer of the stock without the consent of the association, nor can he be allowed to withdraw for the purpose of escaping his just proportion of the common burden. Nor is his liability in any way affected by the fact that he has become a borrower, so long as he still continues a member.

Ordinarily a member is entitled to transfer his stock by assignment, but a by-law which provides that no share shall be transferred while any due of any kind against the owner thereof remains unpaid creates a lien upon the shares as against the stockholder for the indebtedness against him.

Withdrawals.

The right of withdrawal from a building and loan association is absolute and cannot be arbitrarily withheld, and where given by statute cannot be waived even by an express declaration in the certificate. Before a member can exercise this right, however, he must comply with the terms prescribed in the by-laws and voluntarily assumed by him. Inasmuch as a member's relation to the association is essentially that of one of a partnership for a definite period of time, entitled upon its expiration to the profits upon his investment in the enterprise, his failure to continue in the concern is in the nature of a breach of contract, upon which the loss of his previous contributions might not unnaturally be held to follow. To avoid such contingency, therefore, a provision, as politic in the interest of the building association as it

is just and reasonable to its members, is usually made an integral part of the scheme, that a member desiring to withdraw shall be allowed to do so, with the privilege of receiving from the society the amount paid in by way of subscription (after deducting all fines and charges against him), together with such share of the profits of the association as may appear just and warranted by its business.

The right to withdraw does not entitle the member to an account of profits, but merely to a sum equal to subscriptions paid in, less fines and legal charges, and to such proportionate amount of the profits as the by-laws may declare. Acceptance of notice of withdrawal terminates membership in the association; the member at once assumes the position of a creditor, and may recover the amount due. A prescribed notice of withdrawal is usually required by the by-laws, but such notice need not be in writing, unless expressly required so to be, and it has been held that even where required, the association may waive a written and accept an oral notice.

In construing a by-law relative to withdrawal, the Court will lean toward the construction that is most favorable to the members. For instance, the by-laws of an association provide that in case any member by reason of sickness, removal, or through misfortune is unable to continue the payment of his subscription, he may give notice to the secretary of an intention to withdraw from the association; and in case the directors are satisfied as to the grounds of withdrawal his whole amount of subscription shall be returned except the entrance fee, and that any person wishing to withdraw for the above reason or otherwise, and who shall have been a member for a certain length of time and be clear of the books, shall be entitled to a certain interest on that amount. In such a case the Court decided that any person having been a member for the time specified and being clear of the books might withdraw without leave of the directors, and was entitled to the benefits set forth in the by-laws. The requirement of the directors' approval applies only to those who wish to withdraw for the reasons given in the by-laws and who have not been members for the specified time. In Pennsylvania, under the act of 1859, a stockholder cannot withdraw after the stock has reached par, and the association exists only for purposes of liquidation. The only object of such withdrawal is to gain the right to sue immediately for the value of the stock. This would be gaining an unfair advantage which the law does not favor.

The right to withdraw does not entitle the member to an account of profits, but merely to a sum equal to subscriptions paid in, less all fines and legal charges, and to such proportionate amount of the profits as the by-laws may declare.

A member who has perfected his right to withdraw by complying in all respects with the requirements of the governing statute is not estopped by a proviso that at no time shall more than one-half the funds in the treasury be applied to the demands of withdrawing stockholders from bringing suit for the recovery of the amount due until the treasury has funds sufficient to meet his claim. To hold otherwise would enable the association to defraud a member of all benefit from his right of withdrawal by keeping itself in a state of insolvency. The proviso merely intends that the operations of the society should not be embarrassed by having the whole amount of its cash assets taken in order at once to pay the withdrawing stockholders; and this object is amply served by enabling the Court to restrain the plaintiff's execution in order to give the building association a reasonable time to raise the money without undue derangement of its affairs.

The later decisions in Pennsylvania have held that a withdrawing stockholder who held a withdrawal order from the treasurer of the association for the withdrawal value of his stock was not a creditor within the meaning of the assignment laws governing assignments for the benefit of creditors, and was not entitled to any priority over other members. While in a qualified sense withdrawing stockholders may be considered creditors of the association, their rights as against those with whom they have been associated are very different from those of general creditors whose claims are based wholly on outside transactions. If the association has been prosperous, they have a right under certain limitations and restrictions to demand and receive their proportionate share of the accumulated fund. But if bad investments have been made, or losses have been sustained before actual withdrawal, they must bear their just proportion thereof. The right of withdrawal and the extent to which it may be exercised presupposes that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association. After expenses, incident to the administration of its assets, are deducted, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed among those whose claims are based upon the stock of the association, whether they have withdrawn and hold orders

for the withdrawal value of their stock or not. Both classes are equally meritorious, and in marshalling the assets neither is entitled to priority over the other. The claims of each are alike based upon their relation to the association as members thereof. Orders issued to withdrawing stockholders are merely evidence of their interest in the assets remaining after paying general creditors.

It is, however, a right belonging to every member of a building and loan association, by virtue of his membership, in a proper case and under proper circumstances to invoke the jurisdiction of a court of equity to wind up the society and thus compel a settlement.

Right to Receive Loans.

The right to receive a loan is an essential incident of membership, and arises from the nature and objects of the association. An association having funds cannot refuse to lend them to its members in good standing offering proper security. The power to lend money to members when not expressly conferred by charter may be implied from the general object of the association. If a statute confers expressed power to lend money to shareholders upon such terms and conditions as may be prescribed by the by-laws, a loan made otherwise is not *ultra vires*.

The incidents of loans of the character under consideration are (1) stock payments or dues; (2) interest; (3) fines; (4) premiums; and (5) security.

Stock payments or dues are properly an incident of membership in every building and loan association, and are only incident to a loan in so far as the security is conditioned upon their continued payments.

Interest is so much an ordinary incident to a loan that the authority to loan implies the right to take it. It must be of the legal rate, and cannot be charged upon more than the amount actually advanced. The interest reserved by a building and loan association upon an advance to one of its members ceases when it is reimbursed for the advance. In many building associations interest upon the loan and stock payments are consolidated under the name of redemption money or dues, and formed in a single payment. When the dues have been so united by the by-laws their subdivision for the purpose of imposing separate fines for the non-payment of each is improper.

Suits by Stockholders.

A withdrawing stockholder in a building and loan association can only recover the withdrawal value of his stock under the constitution and by-laws of the association, and not its par value, even though it has matured. After the maturity of the stock, a stockholder is entitled not to the matured value but to an equal division of the assets, less expenses and losses.

The Supreme Court of Pennsylvania has decided that a member cannot obtain judgment against the association for want of an affidavit of defense, for the value of his shares merely upon the strength of the report of auditors that the shares were at par, and before a meeting has been convened to wind up and make distribution. Nor does the report of auditors fixing the value of the shares entitle a withdrawing member to a judgment to that amount for want of an affidavit of defense, the value of the shares being liable to a deduction.

Building and loan associations form no exception to the general principle that a stockholder as a stockholder cannot sue the corporation. If he is not content to await the winding up of the concern his course is to withdraw and bring suit as a withdrawing stockholder.

It follows from this doctrine that payments upon stock are not payments upon the loan "which is a necessary consequence of the fact that stock payments are incident to membership"; that is, that payments of dues are not intended to be applied as soon as made as partial payments to the extinguishment of the debt, but are paid as the capital of the company, and paid alike by those who do and do not take loans; that the figure upon which the interest is to be paid, and hence the amount of interest itself, do not vary from the time of taking the loan until it is finally discharged, and that consequently the reservation of an unvarying amount of interest for the whole period of the loan, whilst at the same time the borrowers' stock payments are going on, is not usurious.

Fines may be imposed for non-payment of either subscriptions or interest. As previously defined in these pages, the premium is a bonus charged to a stockholder wishing to borrow, for the privilege of anticipating the ultimate value of his stock, by obtaining the immediate use of the money his stock will be worth at the winding up. It is in effect the difference between the par value of the share advanced and the amount actually received by the borrower. It is not a cash payment, which he is

obliged to make upon obtaining his preference nor can it properly be said to be a deduction made at the time from any money belonging to him. It is in substance the pecuniary standard by which the value to the member who obtains the loan, of the preference over other members seeking the same, is determined. Since, however, in offering its money to borrowers, the society adopts as the basis of its loan the par value of its stock for purposes of computation, the premium must be treated as a deduction and must ordinarily be a gross amount per share, not merely increased interest. The amount of the premium must be determined by fair and open competition.

The weight of authority is to the effect that interest cannot be charged upon the premium.

It is, of course, within the discretion of the building association to allow abatements, discounts or remissions upon the premium bid by an applicant for a loan under specified conditions. Such is the custom prevailing in Pennsylvania.

The power to loan money implies the power to take adequate security for the repayment of the loan, and in the absence of expressed requirement in the statutes or charter that the security taken shall be such and no other, building and loan associations have power to loan money on the same security as individuals, notwithstanding their usual custom is to require the borrower to assign his own stock as collateral to his mortgage. The mortgage or deed of trust of a third person may be taken to secure a loan to a member, and a wife having power to mortgage her separate property for the debt of her husband may give a mortgage to a building association to secure a loan made to him, and in either case the mortgage will stand for the full extent of the undertaking, including interest, fines, dues and charges. In such case the association is under no obligation to notify the third person of the member's default.

Such mortgages secure the payment of a series of small sums during an indefinite period of time. Yet though the time during which the payments are to be made is not specified, there is a contingency stated in the mortgage on the happening of which the payments are to cease; and its duration may be ascertained by proof, or approximated with as much certainty and exactness as the duration of a mortgage securing an annuity for the life of a person. The mortgage, therefore, is not void for uncertainty, but a valid mortgage in law.

In case the stipulations for the payments of dues and interest are not complied with by the mortgagor, there is a provi-

sion inserted for the foreclosure of the mortgage and sale of the encumbered property. In such cases the ordinary course of procedure in equity is to take a preliminary account of the actual arrears and charges standing against the borrower up to the time of the decree, deducting the credits to which the borrower is entitled. If he pays the amount thus found, the sale will be prevented, and the decree will stand against him as security for future payments. If he refuses or neglects to pay them, the sale must take place, and the premises mortgaged will be discharged of the encumbrance.

Mortgages.

A mortgage taken by a building association is security for the payment of money only within the statute and operative only so far as authorized by it, and by the by-laws of the association. The bond and mortgage or trust deed given by the borrower evidences the terms of the contract and cannot thereafter be varied without his consent.

There are three classes of building and loan association mortgages: those in which the condition calls for regular stock payments of fixed amounts and performance of membership duties and liabilities generally, together with the payment of redemption money or interest on the amount advanced (being frequently lumped together with stock payments under the name of dues), to the end of the society's existence; those in which in addition the sum advanced is made repayable; and those in which the nominal amount of the loan, the par value of the shares, including the premium, is made payable, with interest, stock payments, etc., being stipulated as in other cases.

In the first form the obligation is for the payment of dues, etc., solely; in the second, the obligation is nominally for the repayment of the loan, but particularly for the payment of monthly dues on the stock, and the legal interest on the loan until the association is able to divide, to each share of stock held by the members, the sum of two hundred dollars (\$200), and when this result is reached, as the association would owe a borrower on five shares of stock one thousand dollars (\$1,000) and the borrower would also owe the association \$1,000, one debt cancels the other. The third differs from the second only in the fact that interest may be charged upon the premium bid, as well as on the sum actually advanced, which in nowise affects the nature of the transaction.

There is much diversity of opinion as to the nature of the transaction by which a building association loans or advances its funds to members. Some courts regard the transaction as a loan. Others deem it to be a dealing in partnership funds. Others hold it to be an advance on the stock which the borrower expects to be entitled at the termination of the association, while others consider it as a sale by the borrower of his shares of stock to the association.

It has been ruled that a bond and mortgage executed to a building association by one of its members to secure an anticipated loan cannot, if the loan is not made, be retained as security for items owing to the mortgagor, which were to be deducted from the gross amount of the loan when made, where they were neither given nor received as security for such items. Although the mortgage provides that the entire amount secured thereby shall become at once due and payable on default for a specified time in the payment of interest and installments, the association is not compelled to act at the expiration of the specified time in order to protect its rights.

Where at the time of borrowing it is estimated that the stock will mature and pay the loan in a certain time and a note is given payable in such time, a mortgage given to secure such note may be foreclosed at the expiration of such time, even though the stock has not then matured.

Important Decisions.

Two important decisions have been rendered by the Supreme Court of Pennsylvania, which it is of practical importance to bear in mind. The right of an association taking an assignment of a member's shares of stock as collateral security for a loan, for which the member had also given a mortgage, to appropriate such shares at their maturity to the satisfaction of the loan, instead of exhausting the security furnished by the mortgage, is not affected by an attachment of the stock by a judgment creditor of the member. The other decision referred to holds that where a shareholder in a building association has assigned his stock to the association as security for a loan, which is also secured by a judgment, he may elect, on sale of his real estate by the Sheriff, to have the value of the stock deducted from the amount of the judgment before such judgment is permitted to share in the proceeds of the real estate.

It is important to understand clearly the rule adopted for

ascertaining the amount presently due upon a mortgage in case of foreclosure or voluntary redemption. The rule as followed in most jurisdictions requires the probable or possible duration of a society to be approximated by proof, and the aggregate of all the dues or redemption money stipulated for in the mortgage to be calculated as they would accrue during that period, and the whole amount thus found to be charged against the member as a present debt immediately due, in addition to all arrearages and fines. In other jurisdictions the same rule is followed except that when the interest is lumped with stock payments there is a rebatement of interest for the time between the repayment of the loan and the estimated termination of the society, so that the society will not recover interest after that which bears interest, the loan, has been returned to its hands. The rule applies equally to the case of a foreclosure or a redemption, the only difference being that in the latter a withdrawing borrower is entitled to the bonus or proportionate share of the profits allowed by the governing statute or the by-laws of the association. In Pennsylvania the leading case so far as it relates to voluntary repayments proceeds from the provisions of the statutes, and, as for the rest, treats the transaction as a loan which must be repaid, but to which the borrower may apply his stock payments already made.

Where an association is prematurely dissolved and the mortgages of members foreclosed, in determining the amount due the mortgagors should be allowed not only for the sums paid by them as dues, but also for what they paid as interest, while they are to be charged interest on the sums advanced by the association, and so from time to time on the balance of such sums, after deducting therefrom the money paid by them for dues and interest.

A shareholder can set off as against the amount due by him to the association under the mortgage claims held by him against it, consisting of balances due from the association to members who had withdrawn from the association and assigned by them to the mortgagee. Therefore, in striking an account between the association and a borrowing member wishing to redeem and withdraw, the latter is to be credited only with his actual payments on account of stock and interest, and not with any of the profits thereon unless special statutory enactments or the by-laws of the society allow him some share of the profits. Otherwise for the profits, the society is accountable only on dissolution, and then only to those who have persevered in its membership. It has been decided in Pennsylvania that where a mortgage given by

a member of a building and loan association to it becomes divested and payable in consequence of a judicial sale of the mortgaged premises upon the member's decease, that the association is bound to make the same allowances upon the mortgage as if the member had elected to pay off the loan and withdraw.

In ascertaining the amount due it has been held that the Court is bound by the terms of the mortgage and cannot look beyond the articles of association, unless the latter are so referred to in the instrument as to make them a part of the mortgage or call the Court's attention to them. But the rule is not to be so extended as to preclude the Court from examining the articles of association for the purpose of determining when the mortgage contract terminated. It should be borne in mind that in serial societies the rules above laid down apply with this only difference, that the rights and liabilities of each member are referable, in the first instance, to the series to which he belongs.

A sale of the mortgaged premises and application of the previous stock payments made by the mortgagor to the extinguishment of the debt terminates the membership of the mortgagor in the association, and the obligation to continue payment of dues in consequence of membership ceases. If, however, neither the building association nor the borrower applies the previous stock payments to the extinguishment of the debt, and the association collects the whole sum due from the proceeds of the sale of the mortgaged premises or upon voluntary repayment, the whole debt undiminished by any stock payments is returned to the society. The stock remains intact, and the member continuing to hold it retains his membership, and is entitled upon the final distribution to his share in the company's profits. In such case his bond and mortgage remain in the hands of the association as a subsisting security to insure the payment of future installments and liabilities.

Application of Stock Payments to the Extinguishing of the Debt.

The doctrine is well recognized that payments of dues upon the stock are not payments upon the mortgage debt, and do not work an extinguishment of the mortgage in part. But the borrower by virtue of his membership has a right at any time so to apply them, and the association holding a lien upon his shares as security for his debt may in case of default make a like application. But in the latter case the appropriation by the society must be prompt and unequivocal. By such application on the part

of the borrower the stock is relinquished to the association and its value deducted from the amount of the debt owing to it and its membership destroyed. The borrower's representative, his assignee for the benefit of creditors, or executor may also make the application, but in Pennsylvania it has been held that a sheriff's vendee of the mortgagor cannot. When a member borrows money from the association and gives a joint note of himself and another person for the advance, and the borrower's stock being assigned to the association as additional security, the third party has the right to have the stock sold first for the debt. On the other hand, the title to the stock has so far passed from its owner by the assignment, that a subsequent purchaser cannot prevent the association from applying the sums paid thereon in extinguishment of the debt. Where stock is pledged and a mortgage given for the same debt, the mortgagor has the right to insist as against his assignee in bankruptcy and an assignee of the mortgage that the stock be first sold to reduce the amount of the mortgage lien and of the mortgagor's personal liabilities.

A member who has assigned his stock to a third person as collateral security for a debt, cannot, when sued upon his mortgage to the association, claim a credit for the value of his shares.

As between the association and a second mortgagor of the premises, stock held by the association as collateral security will be first applied to the payment of the amount due on the mortgage to the association before recourse is had to the mortgaged premises.

In Pennsylvania there is a class of cases in which the right of applying the stock payments upon the borrower's stock, held as collateral by the building association to the extinguishment of the debt also secured by mortgage in favor of the same, seems to be confined to the original parties to the transaction, the borrower and the society, and in which the right of any third party to compel the society to so apply them seems to be denied.

It has been held in New Jersey that where the building association holds, besides a mortgage upon the borrower's land, an assignment of his stock as collateral to his mortgage, and releases the stock with actual notice of the existence of a subsequent mortgage on the land, that the prior mortgage was, so far as the right of the subsequent mortgage was concerned, satisfied to the extent of the value of the stock.

Membership in a building and loan association, in the absence of some by-law to the contrary (which is rare), does not entitle the borrower upon voluntary repayment of his loan to a pro-

portionate share of the profits to the time of repayment, and even where express provision exists in the constitution or by-laws a defaulting member can claim no such benefit.

Winding Up the Association.

The last feature of building and loan associations which we shall discuss will be the manner in which their business is terminated.

Hopeless insolvency, rendering the accomplishment of the purposes of the association impossible, is a good ground for a petition by members to the Court for the winding up of its business and the appointment of a receiver. The insolvency of a building and loan association is a thing peculiar to itself and consists in its inability not to pay outside debts (for such a case can hardly ever occur), but to satisfy the demands of its own members. Hence it has been repeatedly asserted that the application must proceed from persons interested and suing as members.

The right to invoke the aid of a Court of Equity for the appointment of a receiver for the purpose of winding up the affairs of the association arises where, in point of fact, the time has arrived when the shares, owing to the past accumulations of the business, are worth the stipulated par value fixed by the charter. Such an application must show that the assets of the association are sufficient to pay, over and above the losses and expenses and after cancellation of the advanced members' securities, to every unadvanced member the par value of his stock. In ascertaining the sufficiency of the corporate assets for this purpose mortgages held against advanced members must not be counted as assets. Whenever the assets of the association become equal to the par value of all its stock it is ready to be wound up. However, from a practical standpoint, as soon as one series are taken care of, another series is started, and thus this form of association becomes perpetual.

Whatever liabilities the association has lawfully incurred are, of course, protected upon dissolution. Creditors and depositors are entitled to be paid out of the assets in priority to any of the members, and where a member is also a creditor or depositor he is entitled to come in upon the distribution of the assets as such.

BUILDING CONTRACT FOR BUILDING DWELLING HOUSE

Agreement, *Made this* _____ *day of* _____, 19 _____,
between _____ *of* _____, *hereinafter called the owner,*
of the one part, and _____ *and* _____ *of* _____,
hereinafter called the builders, of the other part.

1. *The builders hereby agree with the said owner to execute in strict conformity with the several drawings and detailed specifications prepared by* _____ *of* _____, *architect, and signed by him as well as by the builders, and such further explanatory drawings and instructions as may from time to time be given by the said architect or other architect for the time being of the said owner, duly appointed by him, the several works therein respectively shown or described, or which may fairly be inferred therefrom, in laying the foundations of and entirely building a private dwelling-house on the site of the house lately known as* _____, *in the town of* _____, *in the county of* _____, *according to the said drawings and specifications, such works to be executed in the most sound, substantial, and workmanlike manner, and with the best materials of their respective kinds, the cost of which, with all scaffolding, ladders, and implements of every kind, is to be borne by the builders, for the sum of* _____ *dollars to be paid to the builders by the said owner.*

2. *The builders shall be paid in the manner following, that is to say: when the said architect, or such other architect as aforesaid, shall have surveyed the works as they proceed, and shall be satisfied that the builders have used due dispatch and executed such works in a sound and substantial manner, then the said architect, or such other architect as aforesaid, shall from time to time give a certificate for such sum or sums of money as he thinks the builders fairly entitled to receive on account of the work so executed.*

3. *Provided, nevertheless, that such sum or sums of money be neither of a less amount than* _____ *dollars, nor more than* _____ *per cent. of the value of the works so executed. And the said owner, for himself, his executors, administrators, or assigns, hereby agrees with the builders, within* _____ *days after such*

certificate shall be presented to him, or left at his place of abode above mentioned, to pay the amount thereof, and also to pay the balance of the aforesaid sum of dollars which may remain due to the builders on the completion of the said works within months after the said architect, or such other architect as aforesaid, shall have certified that the said works have been completed to his satisfaction, and that the builders have complied with the conditions of the aforesaid specifications and drawings.

4. The builders further agree with the said owner that they will finish the whole of the said works and deliver up the same complete in every respect according to the full intent and meaning of the said drawings and specifications, and to the satisfaction of the said architect or such other architect as aforesaid, on or before the day of , 19 , unless such day or time shall be extended by an agreement indorsed upon these presents and signed by the parties hereto and then, in such case, on or before such extended day or time; and in the event of the builders failing so to finish and deliver up the said works, the builders hereby agree to allow and pay out of the balance that may then remain to them the sum of dollars for every week the said works remain unfinished and undelivered up as aforesaid beyond the day or time hereinbefore appointed for that purpose.

Witness the hands of the said parties.

ARCHITECTS AND BUILDERS.

*Building Contracts—Architect's Responsibility—Certificate—
Sub-Contractor—Sureties—Mechanics' Liens.*

AMONG all the business relations into which men enter there are few more complex than those which are sometimes involved in the construction of a building. For instance, we often see the co-operation of a multitude of contractors, journeymen and dealers in materials, under the supervision of an architect, for the owner of the land on which the building is erected, who is also the employer of the architect. As the law on this subject is of universal interest, we shall direct our attention to a brief analysis thereof.

An architect is one whose business it is to design buildings, fix the thickness of their walls, the supports necessary for the maintenance of them in their proper position, and do all other necessary things in the line of his profession for the guidance of builders in the erection of buildings. An architect may be employed in two different ways to render professional services. He may be hired and given salary payable by day, week, month or year, to perform certain duties, or he may be simply engaged to do a certain piece of work either for a fixed sum, or, as is more usual, for a small percentage on the cost of the construction carried out under his charge. His engagement to render service in either of these ways forms the subject of a contract between him and his employer, and, as it is upon this contract that he must rely for obtaining his compensation, he cannot be too careful to have the terms of the agreement clearly understood by both parties. The nature and purpose of a building contract is to govern the respective rights, duties and liabilities of the builder and his employer, and of an architect so far as he is concerned in the contract between them. The general principles of contract law govern building contracts and our inquiry will be limited to those characteristics applicable to this class of contracts only. In this connection it should be borne in mind that the word builder is used by the courts as synonymous with contractor.

Building Contracts.

Building contracts may be entire or severable, and the character of the building contract in this respect depends upon the

intention of the parties to be gathered from the circumstances of the case. The contract may be said to be entire where the building covered by it is to be completed before compensation may be recovered. This is the case even though the amount to be paid is made up by stating the estimated cost of each stage of the work separately and then adding the same together, as well as where payments are to be made from time to time as the work progresses. A contract is also entire where a right is reserved to the owner to suspend prosecution of work and pay for the building when it has been brought to a certain state of completion.

A contract to build for an entire sum payable on completion, but providing that on failure to complete the owner may do so at the builder's expense, has been held to be a severable contract. In a recent Pennsylvania case it was decided that such a contract is severable where it provides for payment of definite sums at different periods before the completion of the entire work.

The contract, whether entire or severable, may be embodied in several instruments. Thus plans and specifications, if made a part of the contract, are essential factors in determining the rights of the parties. Where a contract did not fix the amount of work to be done except by reference to accompanying drawings and specifications, but the drawing and specifications actually annexed to the contract did not fix the amount of work, it was held that a writing, prepared by one party and furnished to the other to estimate and bid thereon, and upon which he made his proposals, which were accepted, which specified within limits the amount of work, was properly admitted in evidence as an accompanying specification.

In order to constitute a valid building contract the language used must be such that it is possible to ascertain to a reasonable degree of certainty the meaning and intention of the parties. Every such contract must contain the elements of mutuality; that is to say, there must be a twofold obligation—the one on the part of the builder to do the work, and the other on the part of his employer to pay therefor. For example, where contractors gave plans and estimates, and the owner agreed to accept the bids, provided certain alterations therein were made, saying that he would make a written contract when he came to the place where the building was to be erected, upon which the contractors agreed to make such alterations at such time, and the owner told the contractors that they might consider that they had the contract, but recommended them not to commence work until he came, as he expected to change the plans, it was held that the correspondence did not constitute a contract.

Written Contracts.

If the contract is to be performed within a year it is not necessary that it be in writing. In consideration of the liability of the human memory to error, and to prevent innocent persons from being imposed upon by people professing to have claims against them founded on long-forgotten conversations, the laws of all civilized countries provide that no Court shall recognize or assist in enforcing any agreement for services which are not to be performed within one year from the time of the making of the agreement, unless the agreement or some memorandum of it shall be in writing signed by the party to be in charge, which is the one from whom payment is sought.

Many States by statute require building contracts to be recorded, otherwise they are void and cannot form the basis of a recovery of damages for prevention of their performance. We will consider this phase of the subject under the title of *Mechanics' Liens*.

It is very essential that all contracts to build be not in violation of any building regulations. Thus where an ordinance requires that a permit for building must be obtained, an agreement between the builder and owner to construct without obtaining such permit is unlawful and cannot form the basis of a civil action. A contract to build which, though lawful in its inception, becomes by a change in the law unlawful to fulfil, is necessarily at an end and cannot be enforced.

A provision in a building contract has been decided to be valid which prohibits the builder from assigning any money payable under the agreement, unless with the assent of the owner, and which authorizes the owner to notify the builder to discontinue the work under contract. A contract may require the builder to tender the owner a satisfactory bond within a certain time of the execution of the contract. It has been decided by the Supreme Court of Pennsylvania, in a decision just handed down, that unless a bond was furnished within the time specified in the contract the other party thereto could rescind. But where they have permitted work to be done before the bond is furnished, a reasonable time must be given to furnish the bond required.

A very common way of engaging the services of an architect is through advertisement. A person or public body wishing to build advertises in the newspapers or sends out circulars inviting architects to send in competitive designs and proposing certain inducements, usually in the way of a prospect of an employment

for them to do so. Where this is done, every architect who prepares and sends in designs in accordance with the terms of the circular is thereby made a party to a valid contract between himself and the parties issuing the circular or advertisement, which he can enforce in any Court, if the advertiser is responsible for his actions or is authorized to bind anyone else. This last is an important reservation, and hence architects and builders should carefully investigate the committees or public officers who advertise for bids of this kind, and satisfy themselves of the responsibility of the party with whom they deal.

Matters in Dispute.

A stipulation is legal and enforceable by the courts, which provides that the certificate or decision of an architect, engineer or other person referred to shall be final and conclusive, with respect to disputes concerning the meaning or construction of drawings and specifications, or the quantity and quality of the work done, etc. An agreement that an architect or engineer shall determine the fitness of material or the sufficiency of the work is a reference of a matter in dispute to a person fitted by special knowledge to determine the facts, and it is for the benefit of both parties that such facts be settled as the work proceeds, and hence an agreement for such arbitrament will be upheld. A stipulation that the engineers of a railroad company shall make final estimates of the quality, character and value of the work done by a railroad contractor and that such estimates shall be final and conclusive as against the contractor, without further recourse or appeal, has been held to be invalid and cannot deprive the builders of the right to refer to the courts for a redress of wrongs and for the recovery of whatever may be due them. The architect to the exclusion of the courts is not vested with authority to determine the questions as to what delay there was in completing the work, and whether it was caused by acts and orders of the owner, or was attributable to the builder, under a provision that changes may be directed by the owner, and that in case of any addition such further time shall be allowed for completion of the work as the architect shall decide to be reasonable, and that any question arising during progress of the work or in settlement of accounts shall be referred to the architect, whose decision shall be binding on both parties.

Provision is frequently made in contracts of the class under consideration that no changes therein shall be made without the

consent of the architect or engineer, and that their consent must also be had before the builder can sub-contract his work. Provisions of this character are regarded as reasonable and will be upheld by the courts.

Liability of Builder.

Ordinarily a builder who agrees to work according to the plan and under the direction of an engineer or architect is not understood to insure the sufficiency of the plan or undertaking as to the scientific correctness of the specifications or the verbal or written directions; and he may stipulate against any liability for the correctness of the plan of the work which he is to execute. On the other hand, he may guarantee the perfection of a plan or the wisdom of directions given under the progress of the work by the architect whose orders he is by the terms of the contract to obey. Since he is bound for his own skill and that of his workmen, as well as for the sufficiency of the material which he supplies, there is nothing unreasonable in a guaranty that the workmanship and the material furnished by him should stand the test of a certain period of time after the completion and acceptance of the work.

A guaranty of the roof of a building for some years against ordinary wear and tear does not dispense with the necessity of the builder completing the roof according to contract, nor does it put the roof in any position different from the rest of the work as to the necessity under another provision of the contract for a certificate that the building is completed according to the satisfaction of the architect.

It is competent for the parties to agree that the employer may retain in his hands money due the builder out of which to meet the demands of material and men, or that money earned by the builder shall be retained until completion of the work to answer any damages suffered by the owner. It has been held that a provision in a building contract that the owner shall hold a certain percentage of the contract price until the completion of the work is for the benefit of the owner and does not render the owner personally liable to a sub-contractor.

Very frequently before a building or construction work of any kind is completed changes become desirable. Care should be taken in the original contract to provide the manner in which modifications or changes may be made, if necessary. Where a portion of a building fell before the whole building was finished

and work was suspended because the builder and owner could not agree as to who was at fault, and subsequently one of the builders made a new contract to complete the structure, it was held that the question of doubtful liability was sufficient consideration for the new contract.

It is optional with the builder to rescind the contract where the employer prevents the builder from performing it, or where there is a failure of the employer to pay in accordance with his contract, unless the builder is himself in default.

A contract by advertisement, that is to say, one that is formed by a proposal or invitation on one side and compliance with its terms on the other, has been decided to be a contract in writing, and, therefore, not subject to the provisions of the Statute of Frauds. Like any other proposal, that made by advertisement or circular may be revoked or modified, provided the revocation or modification is made before it has been accepted by doing work in accordance with it. In all matters of this kind the architect must be sure that the proposal made in the circular letter of invitation is perfectly clear, and that his acceptance of it by doing work in accordance with it, is no less clear, for the law will not do much to help a man who does not perfectly understand other people's propositions, or who makes his own in a manner not easily comprehended.

It is common, for example, for building committees to incorporate in their circulars of invitation to architects conditions which are incompatible with each other, as, for example, setting a limit of costs in one clause, and in the others demanding an amount of accommodation which cannot possibly be had for anything like the sum named. In such cases architects must at their peril obtain from the committee a vote, saying which provision is the one to be complied with. It is not sufficient to obtain an individual opinion from a single member of the committee, as such an opinion does not bind the committee; all the architects who keep their designs down to the limit of costs are liable to have been rejected because they do not give the accommodations desired, while those who provide the accommodations are equally liable to be thrown out because the execution of their designs will cost too much. In neither case will they have any redress. The committee having obtained all the suggestions and information desired, is free to engage any architect of its own choice.

An Architect's Responsibility.

The present tendency of the law is to separate the responsibility of the architect from that of the builder, making the former liable only for the consequences of what is shown to be lack of ordinary professional skill and care in preparing his plans and specifications or in supervising the work under his charge. Within this limit he is held to a strict accountability. The question of how far the architect is an agent for the owner, and is empowered to bind him by his actions or decisions, is one of extreme importance. The ordinary contract between owners and builders leaves this point somewhat indefinite, and architects frequently get into trouble through not knowing how far they are entitled to help their employer without his consent. The general rule is that, whatever may be necessary to complete an act which an agent is authorized to perform is included within the authority of the agent. Outside of the duties expressly mentioned in the contract, architects are impliedly authorized to order and to bind the owner to pay for work and materials which may prove to be necessary for securing the safety of the building under unforeseen contingencies, and even in cases where more mature consideration shows that it is necessary, for the same end, to vary from the letter of the original contract.

Architects are required to exercise reasonable care and skill in the performance of their work. They are not bound to possess the utmost skill, such as only a few members of any profession attain to; but they must show what other architects consider to be a reasonable degree of professional knowledge and intelligence. So far as local regulations are matters of statute law, the architect is bound to know them; and would be liable to his employer for any damages which might be caused by his neglect or ignorance of them. He is not bound to be familiar with the decisions of inspectors or referees in regard to points left indefinite by the statute. He must, however, use due diligence in seeing that any directions or decisions which may be given in regard to the work with which he is concerned are complied with, and if extra work is necessary for the purpose, and the owner is not at hand to give the necessary orders, the architect not only may but should give them, and the owner will be bound to pay for the work so ordered, while neglect by the architect to take the necessary steps in the case of such an emergency will render him liable for a claim on the part of the owner for damages if subsequent loss should be occasioned by such neglect.

An architect must not allow himself to be connected in any way with construction which he knows to be dangerous or even doubtful.

The claim of an architect for compensation for his services depends, both as to the amount which he can collect and the way in which it is to be collected, upon various circumstances. There are two distinct ways in which an architect may be employed. In the first place and by the usual method he agrees to render certain services, consisting commonly in preparing drawings and specifications for the construction of a building and supervising its erection. The owner in return for such services promises to pay him a definite sum, or more commonly a definite percentage on the cost of the structure. By the second method the architect is employed at a fixed salary. In the case of salaried architects they have an advantage over those working on commission or for a specific sum named in the contract in that they incur no responsibility for the consequences of their own carelessness or unskilfulness. An architect paid by a fixed sum or percentage is liable for damages caused to his employer or to the public by his own negligence or ignorance, or that of his assistants. But an architect or other professional person hired on a salary is taken with all his imperfections, and it is his employers and not himself who must pay the bills for the consequences of any lack of skill or care on his part. These conclusions are based upon the general theory of the law of agency.

Draftsmen in architects' offices frequently work overtime, and the question has occasionally been raised whether they have a legal right to claim extra pay for doing so. The law holds that for extra services, voluntarily performed, the person employed cannot claim extra compensation unless an express agreement has been made beforehand that such extra services shall be paid for. This is the principle laid down in a recent New Jersey case, where a claim was made for additional pay for extra services performed during the illness of the employer, without promise on his part to give additional compensation for them.

Where no stipulation has been made beforehand as to the definite sum or percentage which shall be paid for the architect's service, it is usually supposed by the architect that they are entitled to collect compensation according to the schedule of the American Institute of Architects. There is never any difficulty under such circumstances in obtaining a verdict for five per cent. on the cost of the building or construction, this amount

being accepted by the architects in all civilized countries, as well as by the public, as the proper and reasonable compensation for the architect's services.

Penalties and Liquidated Damages.

In most building contracts provisions are made in case of default for the payment of damages to the injured party. In this connection the terms "penalty" and "liquidated damages" are frequently used indiscriminately. Whether a sum agreed upon between the parties to be paid in the event of a breach of a building contract is termed by them a penalty or liquidated damages is not controlling upon the question of construction, and there seems to be a leaning of the courts against construing a contract so as to compel the builder to pay the sum mentioned as stipulated damages, and a disposition to regard the sum agreed to be paid as a penalty to enforce performance. In Pennsylvania the courts are antagonistic to enforcing penalties, and where possible regard the amount stipulated to be paid in the case of default as liquidated damages. The intention of the parties and the subject matter and nature of the agreement are to be considered in determining the meaning of the expression, and the question whether the sum is to be treated as liquidated damages or a penalty must, where there is nothing on the face of the contract which will militate against the sum being liquidated damages, depend on the evidence. It may be stated, however, as a general rule of law that the sum fixed by the parties is deemed to be liquidated damages, and can be recovered as such where the damage and loss which may be presumed to result from non-performance are uncertain and incapable of exact ascertainment, and where the amount named is not on the face of the contract out of all proportion to the probable loss. Where a sum has been stipulated as a payment by the defaulting party which is disproportionate to the probable damage it will be treated as a penalty.

Abandonment of Contracts.

The rules allowing rescission or abandonment of contracts applies to building contracts the same as to other contracts. Thus, in a recent Pennsylvania case, the contract stipulated that rock taken from a necessary excavation should become the property of the builder except such part as should be necessary for the support and protection of the work. It was decided that

the fact that another person through whose property a portion of the structure ran, would not permit the builder to sell rock removed from such portion and did not entitle the builder to rescind the contract, as a right to sell the rock did not occur until the contract was completed.

It is optional with the builder to rescind the contract where the employer prevents the builder from performing it, or where there is a failure to pay in accordance with the contract unless the builder himself is in default. A builder is liable to have his contract terminated where he has violated it in any material part, as where he fails to complete it within the time specified or where the material furnished is defective. The right to annul a contract for non-performance by the builder is lost, where the employer is in default by failure to estimate and pay for work done and material furnished by the builder. Furthermore any misrepresentation or fraud practiced upon either party may be a ground for rescission by the other, provided the fraudulent representation is as to a matter material to the contract and one in the absence of which the contract would not have been made. Likewise where the contract is entered into as to a material matter, the party affected thereby may be relieved in equity from his obligation. What constitutes fraud, misrepresentation and mistake has previously been considered under the subject of contracts.

A building contract may be mutually rescinded or abandoned. The exercise of a right to rescind a building contract must be signified in an unqualified manner with proper notice to the party to be affected thereby and within a reasonable time. Where, as in one case, the builder did the work required to earn the first installment on a contract price for building, which was paid to him, and in consequence of a dispute refused to go on with the contract and discontinued working, but afterwards the owner gave the builder a statement agreeing to submit their mutual claims to an arbitrator and agreed with the builder that his execution of the statement should relieve him from further performing the contract, and both the employer and builder signed the statement, the law holds that the employer accepted the abandonment. Where, however, as in another case, the owner notified the builder that he would, at the expiration of a certain time, himself complete the building if the builder did not, and the builder informed the owner that he would proceed as soon as he could obtain certain material and then notified the owner that he could not secure the material, but that he would

send some men to finish the building if the owner could get the material elsewhere, the law regarded the builder as liable for the proper construction of the building and construed the circumstances of this case as not constituting any assent to an abandonment of the contract.

An architect's contract with the owner, unless some expressed stipulation is made to the contrary, is a personal one. The performance of the contract involves the personal skill and judgment of the architect himself, and cannot be undertaken for him by any assignee in case of his bankruptcy, or by his executors or administrators in case of his death. The contract cannot be assigned by the architect to anyone else without the owner's consent. It is a well-settled rule of law in case of an entire contract for a certain amount of goods or services, that no part of the price is due unless the whole of the goods is delivered or the entire service rendered. As an architect's contract with an owner is held to be an entire one, his family in case of his death or disability would be unable to collect any compensation for what he had done on unfinished buildings, were it not for a special exception which is made by statute in most of the States, to the effect that where full performance of contracts for personal services is prevented by death during the term of the service the personal representative of the deceased is entitled to recover ratable compensation for services actually rendered.

The architect's certificate, which is the document in accordance with which the accounts are closed, is issued after all the work is done, all the extra work noted, and if extras are allowed a reasonable price is fixed therefor. It is usual to pay the builder installments of the contract price as his work goes on, in accordance with interim or provisional certificates given by the architect, and as it is impossible to judge as accurately of the value of work partly done as it is of a completed job under a contract, and as a large reserve is usually made from the total amount earned by the contractor, to serve as a margin to cover contingencies until the completion of the contract, the architect is commonly allowed a certain liberty in estimating the provisional amounts due. He must, however, be careful not to overestimate them or he may, if the builder should suddenly abandon his contract, be compelled to pay out of his own pocket the difference between what he ought to have certified and the amount which the builder has obtained.

After a certificate is given, the architect cannot recall it, unless he discovers that there was some mistake in it. An

architect once gave a final certificate and afterward wrote a letter, in which he said that the certificate was not intended as a final decision upon any just rebate or offsets. The Court held that it was nevertheless conclusive. Of course there may be circumstances in which a different decision would be given. For example, in a certain recent case a church was built from plans made by a certain architect, but the erection was superintended by an assistant. With the tacit assent of the church authorities and of the architect, certificates for interim payments were given by the local superintendent and payments were made on them, although the contract provided that certificates were to be given by the architect. When the church was finished, the architect, who had not visited it before, refused to give a final certificate, although the local superintendent was willing to do so. It was held on a suit by the contractor for his pay, that the opinion of the architect was under the circumstances immaterial, as the local superintendent had been accepted in his place.

Where the contract so provides, the certificate of the architect is just as binding on the owner as on the builder. Where work is supervised by a firm of architects, it has been held that the signature of one of the partners to a certificate, without objection from the other, is sufficient.

Where extra work is done under a contract, it is often claimed by builders that the provisions of the contract as to the production of a certificate, as well as the other conditions of payment, apply only to the work done under the original agreement and not to the extra work. This idea is entirely erroneous. The courts uniformly hold that the contract conditions, in this class of contracts, cover both the original and the extra work, except in case of changes so extensive that the work included in the original agreement can no longer be traced, and there are several decisions to the effect that the requirements of a contract as to certificates apply equally to work detailed in the specifications and to extra work for alterations.

The refusal of an architect to give a certificate of performance must be based on and supported by some real and substantial failure on the part of the builder to fulfil his duties under the contract, and such failure should be pointed out and protested against by the architect, and it must appear that the work was not performed as provided in the contract, and that the builder was not really entitled to the certificate. To constitute a certificate a final one, it is not essential that it be declared to be such, but if in balance or satisfaction of all claims it is sufficient.

Where the building contract expressly provides that the certificate of an architect shall be final and conclusive, it is a well-settled rule of law that such certificate is conclusive and binding in its legal operation and effect upon the owner, the builder and all other parties to the contract, including the sureties. A clause providing that if any differences should arise between the parties in relation to the contract or the work to be performed under it, the decision of the architect should be final, does not render binding a decision on the claim of the owner for a bill for merchandise sold to the builders, as such claim was entirely outside of the contract. So a clause, providing that the decision of the architect shall be final and binding in case the parties fail to agree as to the value of extra or deducted work, or the amount of extra time, or in case of any disagreement between the parties relating to the performance of any covenant or agreement contained in the contract, does not cover a claim made by the builder for the recovery of damages resulting from a delay caused by the failure of other contractors to complete the work.

The only grounds upon which an architect's certificate may be impeached are fraud and such gross mistakes as would imply bad faith or a failure to exercise an honest judgment.

Architect's Duty Toward Builder.

In his relations to the builder, the architect, although employed by the owner, is bound to act fairly. However strict he may be in holding the builder to his contract, he must not try to overreach him or enter into any secret arrangement with the owner to deprive him of any part of the money justly due him. In all cases the architect is presumed to be an impartial man of science, and the contract between the owner and the builder usually makes him the final referee in matters relating to the construction of the building and the regulation of the accounts. If it can be shown that he has a personal interest in distorting the facts in favor of either party, his award loses its validity and both parties are absolved from accepting it. It occasionally happens that delays occur in building due to the fault or neglect of the architect, and in this case the architect must see that he does not try to push off the burden of responsibility for them from his own shoulders on those of the builder. The architect, if he had caused delay by neglect to furnish drawings when the builder needed and asked for them, would not be allowed to

use his position as final arbitrator in matters relating to the contract, to impose penalties upon the builder for the delay caused by his own neglect. It is the duty of the architect to show diligence and care, as well as perfect honesty, in adjusting the accounts between the owner and the builder, failing which he becomes legally liable.

Conversely, the builder owes certain duties to both the architect and owner, which we will briefly outline. The first duty is to furnish the bond required by the contract. It is a further duty of the builder to comply with all building regulations, because a builder cannot recover under a contract where he has failed to comply with all building regulations. Where the contract requires a builder to obtain a permit from the Building Department of the city, he must file plans free from objections and acceptable to the department, as their filing is a prerequisite to the granting of a permit. In many States a permit will only be issued upon the personal application of the owner. If a contract has been awarded to a builder and the owner fails to obtain a permit the builder may recover damages.

The builder is not bound to insure the building he is constructing until its completion, unless the contract so provides. A builder who has agreed to erect a building on the land of another has no right to interfere with the latter's possession any more than is necessary to carry out his contract, and he cannot after his work is completed retain possession as against the owner, with a view of enforcing payment of the price or dispossess the owner. He is only entitled to have such possession of the building given to him as is required for the purpose of labor thereon. It is a practical matter of importance to bear in mind that where an owner of land on which buildings are standing contracts for the erection of new buildings thereon, the builder on taking possession under the contract has a right to the material of the old building, except, of course, where there is some express provision in the contract to the contrary. A contract to excavate land, however, for the erection of a building thereon does not imply that the title to valuable minerals removed in performing the contract is transferred to the builder.

A builder's right to exercise his own judgment with respect to what the specifications and plans require for its fulfilment is subordinated to that of an architect who is authorized to determine their meaning. A builder is not entitled to recover for work as an extra, where it is included in the contract but not mentioned

in the specifications referred to in the contract. Where signed specifications provided that the finishing of certain work should be made of freshly burnt shell lime and thoroughly washed coarse white marble dust, but the plans and specifications submitted to the contractors, and on which they bid, called for a plain cement exterior coat, without the white finish, the builders were held bound to the specifications signed. The courts have even gone so far as to hold that a builder was not liable to furnish elevator gates under a contract calling for a combination passenger and freight elevator, without more particular specifications.

A builder carrying on an independent employment and acting in pursuance of a contract with his employer, by which he has agreed to work at specified times in a particular manner and for a stipulated price, is alone liable for injuries to third parties that occur while the work is progressing and which are caused by his negligence. For negligence of the builder not done under the contract, but in violation of it, the employer is not liable; the relationship of master and servant not subsisting between the parties, but only that of contractor and contractee, and the power of directing and controlling the work being parted with by the employer and given to the builder. But, on the other hand, if the builder is employed generally, and the work is to be performed for a stipulated price, the employer remains liable because he retains the right and power of directing and controlling the manner and time of executing the work. The builder is not liable for injuries to trespassers on the building. The owner is responsible to persons injured by a builder while employed in doing work which in the progress of its execution exposes others to unusual peril. The owner is also liable for the negligence of a builder where such negligence creates a nuisance and where an incompetent and untrustworthy builder is employed. After completion and acceptance of a building the liability of a builder for accidents caused by defective construction ceases and the liability attaches to the owner, whether the damage is attributable to his own negligence or to that of the builder. It must be remembered, however, that the builder is responsible to the owner for defective performance of his contract. In this connection it should be further borne in mind that where the builder performs his work strictly in conformity with the plans and specifications, he is not liable for defects in the work that are due to faulty structural requirements contained in such plans and specifications. If the builder departs from his working contract

without obtaining consent to do so, he becomes a guarantor of the strength and safety of the building.

The courts have held that a builder is not liable for the cracking of walls caused by the unfitness of the soil to sustain them, when the employer refused to have the foundation of the wall made sufficiently deep and broad.

An owner who has paid for all the work that has been done on the contract may immediately upon a default of the builder to complete take possession of the unfinished building; and, if he pleases, employ another person to do what the builder had been engaged to do and had refused to do. This right is not affected because the contract provides that the owner may complete the building; but, where the owner fails to avail himself of a provision to that effect, work done thereafter is done under the contract. When the contract provides that if the builder fails to complete the building as agreed the owner may do so, and deduct the expense from the contract price, the contractor cannot abandon the work and compel the owner to complete it and account to him for the balance of the contract price.

Compensation of Sub-Contractors.

As a general rule of law the builder and not the owner is the person liable for services performed by a person under a contract with the builder and for materials furnished; and sub-contractors and material men must look for payment to the former. Where a building is destroyed by fire while in course of erection, a settlement between the owner and the contractor by which the latter is paid for the work as far as done entitles a sub-contractor to be paid by the contractor for work actually done by him, notwithstanding some things of minor importance may not have been performed in accordance with the sub-contract, since such failure was waived in the adjustment between the original contractor and the owner.

Although a contract with a private individual is a very informal affair, and almost anything will be regarded as a proper signature which shows the intentions of the parties, it is very different where a corporation is one of the parties to the agreement. While a private individual may enter into any sort of contract that he chooses, and will be held to the fulfilment of any promise in consideration of which he has received benefit from another, the powers of corporations are strictly limited either by their charters or by statute, and they cannot be compelled to

carry out promises made by their officers beyond the bounds of their authority, no matter what may be the hardships inflicted upon the persons who have incautiously trusted them.

In the United States the contracts of corporations signed by the proper officers and made in accordance with the statutes or charters regulating the affairs of the corporations may be considered as valid, even though the corporate seal is not attached as part of the signature to the contract. However, it is very necessary that the contract should be within the authority of the corporation and of the officers who claim to represent it, and our courts hold that it is the duty of the person who wishes to make a contract with a corporation to inform himself on this point. If he fails to do so the corporation cannot be held liable for losses which he may suffer in carrying out an agreement entered into without proper authority. Architects and builders cannot be too careful to see that corporations, public and private, have proper authority to execute the contracts entered into with them if they wish to be sure of getting their pay for what they do.

Not only can nothing be recovered on a contract illegally made with the representatives of a public body even if the work is entirely performed, but the agreement, where it is within the legal authority of the officials who make it, must be made with due formality or it will not be binding on the corporation which they represent. It has been held that an agreement made by County Commissioners not at a regular meeting of the board, but in vacation, was not binding on the county, and where the individual members had separately signified their assent this was held to be insufficient.

In certain other respects the rights of a contractor against a corporation are much more restricted than they are against a private individual. For example, no mechanic's lien can be maintained for work on a public building, such as a public schoolhouse, jail, etc., and the property of corporations other than towns, counties or States, where used for the public service, as in the case of railway stations, ferry houses and similar structures, is exempt from mechanics' liens.

Many corporations are formed for the purpose of evading liability on the part of the men who practically own and manage them, and who by placing most of the stock in the hands of irresponsible dependents can, without risking their own property, pile up debts against the corporation which can never be collected for lack of corporate assets with which to pay them; and even where a corporation is formed and managed in good

faith, the directors have no right out of a mere sentiment of honor to pay away the stockholders' money to persons who have no legal claim to it. The old familiar adage, "a stitch in time saves nine," applies with particular force to architects and builders who enter into contracts with corporations of any description.

Some Important Decisions.

In connection with the right of sub-contractors to compensation, briefly touched upon previously, a few important decisions will be valuable to bear in mind. It has been held that a provision made by a contractor in a contract between him and a sub-contractor that he shall be entitled to retain in his hands a part of the earnings as a protection against his liability to the persons employed by the sub-contractors, will not give to the latter or his assignee any right of action against the contractor personally or any lien on the fund itself. An owner who says to a material man, who has already furnished materials to the contractor, that he will pay for all the materials that the contractor might get for the building, is liable, on his promise, for all materials furnished thereafter for the building and charged to him; but is not liable for such material as had before the promise been furnished to the contractor.

A sub-contractor may resort to an owner to the extent of any money paid away to his damage after the owner has accepted an order from the builder in favor of the sub-contractor agreeing to deduct the amount of the sub-contractor's claim out of payments due the contractor on completion of the building. An order or draft if accepted by the owner amounts to an assignment of the fund due under the building contract; and a subsequent assignment from the contractor to a third person for his rights under the contract does not affect the rights thus acquired under said order. Where the owner of a house in process of building accepted an order drawn upon him by the builder in favor of a third person, to be paid when the house was finished, and neither the builder nor the owner finished the house, but it was sold by the latter in an unfinished state and afterward completed by the purchaser, the third party doing some work upon it was entitled to recover from the owner. The fact that a contract provided that the owner should retain fifteen per cent of each partial estimate, made as the work progressed, to insure him that all claims for labor and material would be paid by the

contractor, and that the building should be completed in accordance with the contract, gives a sub-contractor no right of action or claim against the owner for money so retained, though from estimates based on labor and material furnished by him. Persons who have advanced money to the builder with the expectations that it will be used in carrying out the building contract cannot, where some of it has been paid to laborers and material men, demand that an owner's right to withhold the funds only in case of non-payment of laborers or material men be exercised in their favor.

Rights and Liabilities of Sureties.

Sureties are bound only in the manner and to the extent provided in the obligation of the bond, and its terms cannot be changed without their consent, even with a view to avoid ultimate liability. Thus, if payments are made to the builder in excess of the amounts due on the estimates, they will not be liable for the excess and payment to the builder without the surety's consent of a percentage that should, under the building contract, be reserved until completion of the work for which a bond was given discharges the surety.

Where the retention moneys have been paid over and thereby the position of the sureties has been altered, but such change in position has been effected by fraudulent execution of the work, the honest execution of which the sureties have guaranteed, the sureties are not discharged, it being a principle of the law of suretyship that a surety cannot claim to be discharged upon the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by a fraudulent act or commission, against which the surety, by the contract of suretyship, has guaranteed the person with whom he has contracted.

On the default of the builder, in cases where the contract requires him to pay for all labor and material furnished, a right of action directly against the sureties accrues to unpaid laborers, material men, and sub-contractors. However, in the absence of this provision the sureties are not liable, unless they have completed the building on his default, and under an agreement with him collected the price from the owner.

Sureties on a bond conditioned for building in accordance with plans are released by a substantial change in the plans, if the changes are made without their consent. Changes and altera-

tions made by the owner will not release the sureties where the contract permits him at any time during progress of building operations to make alterations, changes, or additions without invalidating the contract, or where the bond itself contains a similar provision.

A surety is not discharged from his obligation because a building contract, plans and specifications, or the bond itself, have not been filed or recorded as required by statute.

A builder may recover for all damages occasioned him by the owner's or employer's breach of the contract. Thus he may recover not merely the sum he may have paid his sub-contractors, but for losses caused by his having been compelled to do the work in an unusual and more expensive manner, or in more inclement weather, and for all elements of loss proximately affecting him. Interest on capital invested by the builder for material and on money due to him should be allowed in estimating his damages, notwithstanding the amount he seeks to recover may be reduced because he has deviated from the terms of his contract, but interest will not be allowed on his profits until they are determined by the verdict.

Mechanics' Liens.

Closely allied to the subject of architects' and builders' contracts is that of mechanics' liens, and as the law regulating the rights of mechanics and material men affects such a vast number of people, we will direct our attention to a brief analysis of this subject. The law of mechanics' liens is more or less technical, and being the result of statutory enactment, varies considerably in the different States.

A mechanics' lien is a lien created by statute which exists in favor of persons who have performed work or furnished materials in and for the erection of a building. The lien is given to secure priority of payment of the price and value of work performed and the materials furnished, and springs out of the appropriation *and use by the landowner of the mechanics' labor and the materials furnished*. It rests upon the broad ground of natural equity and commercial necessity. Without the existence of the mechanics' lien laws, the judgment creditors of the owner of property might levy upon and sell the new or improved property before the builder could secure a judgment for his claim, with the effect that the latter might be unable to secure compensation for the services he may have furnished or the money he may have expended. It is evident that without some such

protection, building operations would be incalculably hampered. While such liens are now looked upon merely as a special protection to building contractors, they were originally proposed as a means of enabling a poor man to secure a contractor to undertake the building of his home.

The law regulating mechanics' liens has been codified in most States, and differs only in minor details from that adopted in Pennsylvania by the act of June 4, 1901.

In Pennsylvania a mechanics' lien is of an arbitrary character. It attaches at once and is binding upon the property from a designated event for a specified period of time, and it may be further continued by simply filing at or before the expiration of that period, in the office of the Prothonotary of the proper county, a claim. The Legislature of Pennsylvania in 1901 passed an act which practically inaugurates a complete change in the mechanics' lien laws of this State. This act is in the nature of a code, and regulates all the rights and remedies of mechanics and material men arising out of building operations.

In the first place, every mechanics' lien is based upon a debt contracted for work done or materials furnished for or about the erection and construction or alteration and repair of buildings. A mere naked, unexecuted contract would not be sufficient in itself to support a lien, as there is required in addition a performance of the work or a delivery of the articles for which compensation is claimed. This work must have been done, or the materials furnished, not upon the credit of a contracting party, but of the thing erected or repaired. The contract need not necessarily be in writing, but may be entirely oral.

It sometimes happens that an agreement is made between the owner and contractor wherein the contractor waives the privilege of filing a lien for labor or materials furnished. Inasmuch as sub-contractors likewise have the privilege of filing a lien, as we shall show later, it is manifest that such an agreement to waive the right to file a lien would not be fairly binding upon such sub-contractors as had no knowledge of such agreement to waive. A provision in a contract between the owner and contractor that no mechanics' lien shall be filed, to bind a sub-contractor, requires that actual notice of such agreement shall be given to him before any labor or materials are performed or furnished by him. If such a contract is filed in the office of the Prothonotary of the Court for the county in which the building operation is located, prior to the commencement of the work upon the ground, or within ten days prior to the contract with

the claimant, the same will be regarded as constructive notice to the sub-contractor and hence binding upon him.

In order to establish a mechanics' lien it is usually necessary that the materials furnished or labor performed should have gone into something which has attached to and become a part of the realty, and has added substantially to the value thereof. A lien cannot attach to one piece of property for labor performed on other property, although it be contiguous. The fact, however, that a building on which a lien is claimed extends over the line of the land described in the petition will not defeat the lien on that part of the building standing on the land described, for the value of the labor thereon, if this can be ascertained.

As a general principle of law, a mechanics' lien attaches to the building or other improvement constructed, and the interest of the owner in the land upon which it is situated, whether such interest be a fee simple, an estate for life, or any less estate than a fee. The lien extends to any interest in land that is legally subject to mortgage.

A mechanics' lien can attach to equitable as well as legal estates in land. Thus the interest of one who being in possession of land under a contract of purchase, erects a building or other improvements thereon, is subject to the lien. But a mechanics' lien cannot attach to the equitable lien of a vendor for the purchase money when he has conveyed the whole title. A mechanics' lien will likewise attach to the interest of a lessee, whether he has an estate for years or is merely a tenant from month to month. In order, therefore, to create a mechanics' lien of any value as to the ground built upon, the party in possession at the time the structure is commenced, and at whose instance it is erected, must have some estate in the land to the extent of which it may be bound, though that estate be of the most remote character.

The present law is to the effect that an owner of land in possession at the time a building is begun, and at whose instance it is erected, may subject his estate therein to a lien for a debt contracted for work done or material furnished for such erection, and this, notwithstanding the claimant may be one who dealt with him under a special contract.

Right to a Lien.

In order to establish a mechanics' lien it is usually necessary that the materials furnished or labor performed should have gone into something which has attached to and become a part

of the realty, and has added substantially to the value thereof. A lien cannot attach to one piece of property for labor performed on other properties. In the construction of statutes giving a lien for the erection and construction of buildings the controlling element in deciding whether or not a lien can exist appears to be whether or not a new building has been put up. Whether or not the lien can be obtained in a particular case must depend upon the facts. A building may be greatly changed in structure without losing its identity; it may, on the other hand, be so entirely changed in plan and general appearance as to become in a fair sense a new building, although some portions of the old materials may remain in it. Merely adding a basement is not an erection or construction, nor is the adding of a bath house, and where an old house whose walls are standing is repaired there is no lien therefor as against a new structure.

Many statutes, including those in Pennsylvania (see act of 1901 and supplements), extend mechanics' liens to include repairs, alterations and improvements.

In this connection the law in the matter of repairs is virtually the same as the law in the matter of new erections, according to the uniform decisions in Pennsylvania.

Persons Entitled to a Lien.

Not only the persons contracting directly with the owner or his agent may acquire a lien, but likewise certain sub-contractors. Section I of the act of 1901 in Pennsylvania defines a contractor to be one who by contract or agreement, express or implied, with the owner, or one who acts for the owner, plans or superintends the structure or other improvement or any part thereof; or furnishes labor, skill or superintendence thereto; or supplies or hauls materials, reasonably necessary for and actually used therein, or any or all of them. A sub-contractor, as we pointed out previously, is one who by contract or agreement, express or implied, with the contractor, or with one who acts for him, undertakes to do certain of the things enumerated in the definition of a contractor, above given. It will thus be seen that a lien may be filed by either the person contracting directly with the owner or by the person contracting with the contractor. The question which naturally might arise is whether the sub-contractor of the sub-contractor, and so on indefinitely, may file a lien for labor or material furnished, which question we will consider a little later.

It should be borne in mind in discussing this subject that personal property which is so attached to real estate as to become a part of such real estate is usually held to be within the mechanics' lien laws. Accordingly, lien laws have been held to extend to stage fittings and scenery, theatre seats or chairs, store shelves placed so as to conform to the building and nailed to the wall, window and door screens, manufactured for and fitted to a building, wires and insulators in an electric lighting plant, mirrors set in a wall, and a large tank upon a foundation expressly built for it. However, lien laws, as a general rule, do not cover trade fixtures, such as tables placed in a store building, but not attached, temporary partitions, etc.

Whether or not machinery is within the lien laws usually depends upon whether it becomes a fixture. If it is stationary and firmly attached to the realty, so as to become a part thereof, it is the subject of a lien, otherwise not.

The statutes in most States, including Pennsylvania, give a lien only for work or labor performed on, or material furnished for, the building or other improvement, and a lien can be acquired only where there is something due to the claimant, and the claim to be secured and enforced is such as the statute contemplated. When a round price is to be paid for labor and materials for a part of which the law gives a lien, and for another part of which there can be no lien, and there is no way of determining how much is of one kind and how much of the other, no lien can be enforced for either. This principle of law should be carefully borne in mind in making a contract to perform labor or furnish materials in the construction or improvement of a building.

The persons entitled to a lien under the law of Pennsylvania, which in this regard may be taken as a criterion, are: Any contractor, architect or builder and any sub-contractor contributing work or work and materials upon the credit of the building and in compliance with a contract to erect; any workman contributing work at the request of an owner or contractor, toward the erection and upon the credit of the building; and any material man furnishing materials at the request of an owner or a contractor to erect, dealing immediately with an owner. An architect or builder who directs and oversees the execution of the work, does work about the erection of the building within the intendment of the law, and is entitled to a lien for his labor. But where a mere architect confines his work to preparing the plans and writing out the specifications, doing nothing further, he is not entitled to a lien.

The right to a lien for materials furnished extends to all such materials as ordinarily enters into or are used in the construction, repair or improvement of buildings. Whatever may be the condition of material furnished in the construction of the building, whether they are very rough or perfectly adapted for their purposes, and in whatever quantities, or from whomsoever they may have been originally purchased, or although kept by the contractor as merchandise, his lien is not affected by these considerations, provided only the materials are included in the work contracted for.

It has been held that a mechanics' lien for materials may attach, although they were furnished at a place other than where the building or other improvements was erected or made, and even though the place of furnishing the material is without the State. It is laid down, however, as the general rule that the lien attaches only for materials actually used in the construction of the building. A lien may be allowed where materials have been prepared or furnished as ordered and the owner refuses to accept or use them. It is sufficient in most States that the material be furnished on the credit of the building for use therein, and it is immaterial as between owner and furnisher whether they are used or not.

There can be no mechanics' lien for money lent or advanced to a contractor or other person for the purpose of enabling him to purchase material for or pay for labor upon a building or improvement.

Under the title of workman are classed all such as are neither contractors nor sub-contractors. But such master workmen or inferior contractors as contract with the owner or a contractor to furnish special work toward the erection or repair of the building, as, for example, to manufacture all the mouldings, door and shutters, are not regarded as coming within the legal definition. Mere subordinates or journeymen, however, are not included within this class of claimants and have no lien.

It is usually held that where the contract is for a building generally, extras subsequently ordered will be covered by the lien, at any rate if provision is made in the contract with regard to extras, thereby showing that they were contemplated. There is no lien for damages sustained by the contractor by reason of a breach of contract by the owner, or damages of protest on an acceptance given for work and labor. Neither is a sub-contractor entitled to a lien for damages and expenses incurred through idleness, nor on account of work made necessary by the default

or negligence of the principal contractor nor for breach of contract on his part. It must always be borne in mind that the lien is intended to merely cover the actual work done and materials furnished on the credit of the building constructed or improvement made thereon.

It is usually held that where a lease contains a provision authorizing the lessee to make repairs or improvements at the cost of the lessor, either generally or by deducting the cost from the rent, or where part of the consideration for the lease is the making by the lessee of improvements which become a part of the realty, or that improvements made by the lessee shall revert to the lessor, a mechanics' lien may attach to the property for work done or materials furnished pursuant to a contract with the lessee. And it has even been held that a mere provision in the lease authorizing the lessee to make improvements at his own expense shows such consent of the lessor as will authorize a lien on the property. But where, although the terms of the lease require the lessee to erect a building on the property, it is also provided that such building shall be the property of the lessee, removable at the expiration of the lease, no lien on the lessor's interest arises out of the erection of such building.

The Act of 1901.

It will be remembered from what has been stated above that a contractor, whether for the entire construction or only for some primary part of a building, may confer on those with whom he contracts to do parts of the work embraced in his contract the right to liens on the building. But, on the other hand, under section 1 of the Pennsylvania act of June 4, 1901, a person contracting with a material man who has the contract to furnish the material for a building may not have a lien. The same section provides that an architect cannot file a lien for work done by him under a contract with the contractor, although he may for work done by him under contract with the owner. The contractor who plans or superintends the erection of a structure, or furnishes the labor therefor, is not in the eyes of the law a mere workman, but rather an agent for the owner, and thus, representing him, has power by contract to subject the building to a lien for work or labor procured by him. While it is true that a material man is said to be a contractor in the act of 1901, he does not as such stand in a representative capacity, and the act, as we have just seen, specifically precludes those who contract with him from filing a lien.

Difficulties may frequently be overcome with reference to the right to file a lien, by taking advantage of the twenty-sixth section of the act of 1901, which provides that any claim filed or to be filed under the provisions of this act may be assigned or transferred to a third party, either absolutely or as collateral security.

As a general rule, where a husband contracts in his own name for a building or improvement on land which is owned by his wife, a mechanics' lien cannot be obtained. But the property may, however, be subjected to a lien where the husband in making the contract acted as her agent or representative, or where she has held out her husband as her agent. Nevertheless, in order to charge the wife's land under a contract made by her husband, it must clearly appear that she authorized him to act for her, and no authority from the wife to the husband will be inferred from the mere existence of the marital relation.

Whether a mechanics' lien attaches under a building contract depends at the outset upon the nature of the contract and not upon that which is done under it. A contractor must show that his contract brings him within the terms of the law or he cannot have a lien. The contract pursuant to which the labor is done or the materials are furnished must be one that can be enforced in an action at law. It must rest upon a valid consideration, and be sufficiently definite to enable the amount to become due under it to be determined with reasonable accuracy and precision. Where a contractor is doing business under a trade name other than his own, a contract made with him in such name shows that he is the real party in interest and entitled to a lien. The consent of the owner to the improvements for which the lien is claimed must be absolute and not clogged with conditions.

Too much care cannot be exercised on the part of contractors and mechanics as well as material men in looking up the title to the land, and in seeing that their agreements are in proper shape, as a little precaution in this regard frequently saves unnecessary time, trouble and expense.

In Pennsylvania, prior to the act of 1901, no lien could be had unless the labor done was of a material nature, such as the carpentering, mason work, etc., it being held in one case that no lien could be had by persons furnishing an elevator car or cage to the one contracting with the owner of a structure to place an elevator therein. Under the present law this rule is changed. Section 2 of the act of June 4, 1901, provides sub-

stantially that every structure or other improvement shall be subject to a lien for the payment of all debts due the contractor or sub-contractor in the erection and construction and removal thereof, in the addition thereto and in the alteration and repair thereof, and of the out-houses, sidewalks, yards, fences, walls or other enclosure belonging to said structure or other improvement; and in the fitting up or equipment of the same for the purpose for which the improvement is made, including paper-hanging, grates, furnaces, heaters, boilers, engines, chandeliers, brackets, gas and electric pipes, wires and fixtures. Also for like debts contracted by such owner in the fitting up or equipment with machinery, gearing, boilers, engines, cars or other useful appliances, of new or old structures or other improvements, for business purposes, and for like debts contracted by such owner for rails, ties, pipes, poles and wires, and the excavations for and laying and relaying, stringing and restringing said rails, pipes or wires.

While a contractor or sub-contractor whose contract includes the putting in of chandeliers, the building of fences, etc., will have a lien under the present law, such would not be the case where alterations or repairs of this kind are made, under separate contract, the price for which did not amount to over \$100.

It is important in the present connection to distinguish between what constitutes new structures and alterations. The term erection or structure as used in the law of mechanics' liens is, of course, applied in the first place to an entirely new building. A rebuilding of an old erection upon a different scale, and a changing of it as to the exterior into a new structure, is treated as such a construction as may subject the property to a mechanics' lien, for work done or materials furnished for or about the erection of a building.

Section 3 of the Pennsylvania act of June 4, 1901, provides that a substantial addition to a structure or other improvement shall be treated as a new erection or construction thereof, and that every adaptation of an old structure or other improvement to a new or distinct use, and which effects a material change in the interior or exterior thereof, shall also be deemed an erection or construction. Under the law at present in force a mechanics' lien may be had for the removal or demolition of a structure as well as for the building or alteration thereof.

Where a building is unfinished by reason of the negligence or interference of the owner, the contractor or sub-contractor may have a lien for the amount of the work actually done. It

should be carefully borne in mind that no lien can be had where the building before acceptance by the owner is destroyed by fire or other casualty.

No claim of a sub-contractor is valid for alterations or repairs unless written notice of an intention to file a claim therefor, if the amount due be not paid, shall have been given to the owner on or before the day the claimant completed his work or furnished the last of his materials.

We will purposely omit in the discussion of this subject the requisites of notice and claim in perfecting a mechanics' lien, as they are technical and involve rules of procedure. It is our object to emphasize the rights and remedies provided by law for the benefit of mechanics, but the methods by which such remedies are to be obtained must be most strictly followed out, and in case of a necessity for filing a mechanics' lien an attorney should be consulted.

Operation and Effect of Lien.

As a general rule a mechanics' lien can be enforced for the full amount due and unpaid for the work and materials furnished. The recovery in an action to enforce the lien is limited to the amount claimed in the notice, claim or statement filed pursuant to statute, with interest. Thus, where a sub-contractor's lien notice does not cover labor to be performed or materials to be furnished, he is not entitled to a lien for what was done or furnished, after filing the notice. In the case of a sub-contractor or material man claiming under the contract with the contractor, the claimant is entitled to enforce a lien up to the amount fixed by such contract, although the contract price includes a profit over the value of the labor or materials furnished. Under the law in Pennsylvania a limitation is placed upon the above rule to the effect that a person other than the original contractor cannot enforce a lien for more than the reasonable value of the work done or materials furnished.

The lien may include interest on the amount of the claim from the time it became due, but where it is sought to enforce a lien for the reasonable value of what was done and furnished, and the precise amount due is neither fixed nor ascertainable by mere mathematical calculation, the demand, not being liquidated, does not draw interest.

There is respectable authority which supports the view that the right to a lien accrues when the claimant has com-

pleted the work or furnished the materials and that the lien attaches to the property at the time when the contract is made or recorded. However, the general rule of law is that the right to a lien accrues at the time of the commencement of the work or the furnishing of materials out of which the lien arises, or the commencement of a building or improvements for work done or materials furnished for the construction of which the lien is claimed. The Supreme Court of Pennsylvania has decided that when the plan of a building is changed and greatly enlarged while in course of construction, the liens of mechanics and material men subsequent to such change relate only to the commencement of the alteration on the ground, and are subject to all liens which had then fastened on the land.

In view of the above-stated rule it becomes important to determine what constitutes the commencement of a building or improvement which regulates the right of a mechanic and material man to file a lien. The commencement of a building or improvement within the meaning of the lien law is the visible commencement of actual operations on the ground for the erection of a building; the doing of some work or labor on the ground, such as beginning to excavate for the foundation, walling the cellar or work of a like description, which everyone can readily see and recognize as the commencement of a building, and which is done with the intention and purpose then formed to continue the work until the completion of a building. But work which is merely preparatory to building operations at some future time, and does not of itself tend to contribute directly to the erection, such as clearing, leveling, filling up or fencing the property, does not constitute a commencement for the purpose of fixing the time to which the lien relates.

A temporary cessation of work, where the design of building is not abandoned, and work is subsequently resumed and prosecuted without any substantial change in the design, will not prevent the relation back of liens to the time of the original commencement. However, where the project is abandoned and work is afterward resumed under a new contract between different parties, a mechanics' lien cannot relate back to the time when the building was originally commenced, but relates back only to the time of the recommencement.

What the Lien Binds.

No personal liability on the part of a defendant is created by the filing of a statement of claim under the mechanics' lien system and the taking of steps to recover thereon; the sole

object is to secure the compensation of the claimant, by a lien binding the premises for the improvement of which he has expended labor or furnished material; when this source is exhausted, the law has fulfilled its part, and the mechanic or material man who is not fully satisfied must seek redress through some other channel. The question of importance which next presents itself is what the lien binds, whether only the structure erected, without the ground, or both? In Pennsylvania recent statutes make direct provision that the lien shall extend to the ground covered by the building, and to so much other ground immediately adjacent thereto, and belonging in like manner to the same owner, as may be necessary for the ordinary and usual purposes of the structure. In fact, the general rule extends the lien to the building and so much of the land upon which it is situated as is necessary to its convenient use and occupation, and ordinarily covers the entire lot, tract or parcel upon which the building or improvement is situated. Land outside of these limits is not subject to the lien, but the parties may by contract extend the area of property to be covered by the lien beyond what would be subject thereto under the statutes.

If the person by whom the contract for the building or improvement was made was not then the owner or the absolute owner, but subsequently becomes the absolute owner or acquires a larger interest than he formerly had, the lien attaches to the subsequently-acquired interest. Where the property subject to the lien has been sold and converted into money, the Court will follow the fund into the hands of the person who converted the property into money and have the lien satisfied out of such funds.

Priorities of Liens.

All mechanics' liens on the same property and arising out of the erection of the same building and improvement stand on an equality and share equally in the amount realized if it be not sufficient to pay all in full, regardless of whether the claims are for labor or for materials, or of the times when the several claimants entered into their contracts for what they did or furnished.

The thirteenth section of the Pennsylvania act of 1901 provides that mechanics' claims shall be paid out of the proceeds of a judicial sale of the property described therein, in prefer-

ence to any estate, charge or lien of which the claimant had not actual or constructive notice at that time, except municipal or tax claims and the exemption allowed by law. In the case of a claim for a new structure, an estate, charge or lien, of which the claimant had actual or constructive notice before the date of visible commencement upon the ground, if given to secure advancement of money, knowingly to be furnished for the purpose of making the improvement in whole or in part, shall have with prior liens and encumbrances, a preferential claim upon the funds raised by a judicial sale of said property to the extent only of the actual value of the property immediately prior to such visible commencement of the work; but the proceeds of such sale, above such value, shall be applied to the payment of the mechanics' claim in preference to such estate, charge or lien. The lien of every such claim shall bind only the interest of the party named as owner of the property at the time of the contract or subsequently acquired by him.

Where the property is subject to a mortgage or other encumbrance at the time when the building is commenced, such lien is entitled to priority over any mechanics' lien arising out of the improvement of the property. Mechanics' liens are entitled to priority over all subsequent liens and encumbrances attaching to the property after the commencement of the building or of the work of furnishing of materials out of which the lien arises. A mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of the mechanics' liens. In New Jersey it is well settled that purchase money mortgages, including amounts to be advanced by the vendor, are entitled to priority over mechanics' liens to the extent of the money actually advanced pursuant thereto, provided the mortgage is recorded or registered before any lien claim is filed.

A mechanics' lien attaching to property when it comes into the mortgagor's hands is superior to a mortgage executed previously and covering that property as after-acquired property; but a mechanics' lien for improvements made on the property after the title was acquired by the mortgagor is inferior to a mortgage executed before title was acquired, but covering the property as after acquired property.

Where the holder of a mortgage which is prior to a mechanics' lien becomes the purchaser of the property at a tax sale, it has been held that such purchase extinguishes the mortgage debt,

and the mechanics' lien remains the only lien upon the property in the hands of the purchaser.

Under the Pennsylvania enactments all moneys due on account of wages for labor and services to specified classes of employees, for any period not exceeding six months preceeding the sale of the establishment in which such employee may be engaged, shall be a lien upon such establishment to the extent of the interest of the employer, provided the amount due such employee shall not exceed \$200, and he shall within a specified time have filed a claim in the Prothonotary's office. No mortgage or instrument by which a lien is created operates to impair or postpone the lien so given for wages, nor does such lien for wages operate to impair the lien of mortgages or judgments entered before such labor is performed. In the event of a sale upon execution, such an employee-claimant, if he desires his claim to be preferred and first paid out of the proceeds, must, before the sale, give written notice of his claim and the amount thereof to the officer executing the writ.

As to whether claims of this character have a priority of payment out of funds for distribution in the hands of the Sheriff over mechanics' liens not proceeded upon to judgment, but attaching before the work is done for which the claim for wages is set up, the authorities are not uniform, but it has been decided that where the wage claimant for whose compensation a judgment has been confessed by the employer neglects to give the notice required by statute to be given to the officer executing the writ of execution, payment of his claim is postponed to the payment of mechanics' liens attaching before the confession of such judgment.

Bond to Discharge Lien.

The statutes of most States provide for the execution and filing of a bond by the owner or the contractor for the use of persons in whose favor liens might accrue, conditioned for the payment of claims which might be a basis of liens, which bond is substituted as security in place of the lien on real estate.

It has been held that a bond executed by the contractor as principal without the owner of the property uniting therein is sufficient to discharge a lien filed by a material man.

The owner of any interest in property on which there is a mechanics' lien may become the principal in a bond for the purpose of discharging the lien, and it is not necessary that all

the owners or persons interested should unite in the bond as principals. In a number of States statutes have been passed allowing any person having an interest in property upon which a mechanics' lien is claimed to give a bond to dissolve the lien upon his interest, the purpose being to allow anyone possessing an interest in the whole or any part of the realty to free his title from such an encumbrance and to prevent the land from being sold to satisfy the lien.

When a bond is given, approved and filed, as provided by law, the effect is to prevent liens from attaching, and discharge liens which have been already filed. The filing of a bond after a suit to enforce a lien has been commenced does not necessitate the dismissal of the suit, but after the bond has been filed it is error to decree a lien.

The obligation of the sureties on a bond given by the contractor conditioned for the payment to persons performing labor and furnishing materials of the value of such labor and materials is collateral to the obligation of the contractor to pay therefor, and can be enforced against them only to the extent that the same obligations could be enforced against the contractor. The fact that the principal procured the signature of a surety upon the promise that the principal would afterward contain the signature of another surety which was not done will not relieve the surety from obligation on a bond delivered, approved and filed as the law requires.

A mechanics' lien may be discharged according to the law generally prevailing by the owner depositing in Court an amount sufficient to satisfy the claim or the balance due from him to the contractor. The claimant is not entitled to receive the amount deposited until he has established his claim and lien on the land in an action brought for that purpose, and the payment into Court is not an acknowledgment of the claimant's right or a waiver of defenses.

Extinguishment of Lien.

The courts will not readily hold that a mechanics' lien, once duly acquired, has been lost or extinguished in the absence of circumstances tending to show a waiver or making it inequitable that the lien should remain in force. Thus the right to a lien is not lost because in an attempted settlement the lienor refused an offer of more than he subsequently recovered, no tender having been made. The right of a sub-contractor to

enforce a mechanics' lien on a property is not affected by the insolvency of and the appointment of a receiver for the principal contractor, or lost by the sub-contractor's failure to consolidate his claim for labor with others in an action before a Justice of the Peace against the original contractor, where such other claims are wholly disconnected with his lien and have no relation to the transaction out of which it arose. Where a contract provides that payment shall be made for work on final estimate and certificate of an architect approving the work, and a showing that the work is free from all liens, and after the final estimate is made and the certificate procured, the contractor, being refused payment, files his lien, the fact that sub-contractors subsequently file liens for work will not defeat the contractor's lien.

While it has been held that the destruction of the building or improvement out of which the lien is claimed to arise defeats the lien upon the land, the more general rule is that a mechanics' lien which has attached to a building or improvement and the land on which it is situated is not defeated or extinguished by the destruction of the building or improvement by fire or other casualty, but remains effective against the land, even though the building or improvement is destroyed before the work thereon is completed.

A contractor for an entire building not being excused from performance because of the destruction of the building, may, if the building be destroyed before completion and not rebuilt, lose his right to compensation for what was previously done or furnished, and in such case there could, of course, be no lien.

A sale or conveyance of the premises after the lien has attached thereto does not affect the rights of the person filing the lien. This is true as a general rule, even though such conveyance was made before the filing of the lien notice or claim required by statute to perfect the lien, provided, of course, the claimant perfects his lien within the statutory period. It is immaterial that the purchaser bought the property in good faith, and without notice, for the mere fact that buildings or improvements are being erected on the property constitutes constructive notice of the mechanics' liens to persons dealing with the property. As the lien extends to the entire lot or tract on which the building or improvement is situated, a part thereof cannot be sold free from the lien, and it has been held that where labor and materials for the improvement of three houses were furnished under a single contract, subsequent purchasers

of two of the lots, with notice, were not entitled to complain that their lots were held responsible for the entire debt.

With reference to work done or materials furnished after a conveyance of the property, it has been held that a lien may be established covering the same if the work was done and the materials furnished pursuant to the original contract after a sale of the premises. However, it should be borne in mind that materials furnished after a sale, not in pursuance of the original contract and without the knowledge of the purchaser, but merely to preserve the right of lien, are not the subject of a lien. An assignment by the owner for the benefit of creditors does not prejudice the right of mechanics' lien claimants, but their lien as to the property to which it has attached remains superior to the rights of general creditors.

Where the purchaser of land on which there is a mechanics' lien agrees to pay off the same, and save his grantor harmless therefrom, the lien may be enforced against the land in the hands of the purchaser without first exhausting the remedy against the grantor.

A judicial sale of property under a lien prior to a mechanics' lien divests the latter lien and the claimant must look to the surplus proceeds of the sale for satisfaction. Where there are several mechanics' liens arising out of the same improvements and thus of equal rank, a sale under one of the liens passes the land free from all others.

Release of Lien.

A release of a mechanics' lien must be founded upon a consideration, and if the consideration fails the release is void and the lien may be enforced. A release executed by mechanics or material men during the progress of the construction of a building, of all manner of liens, "which we or any or either of us now have or might or could have on or against the said building," is an unconditional agreement to look to the personal responsibility made during the progress of the work, is operative to discharge the building from mechanics' liens as effectively as though made after its completion, and releases the lien for labor done and materials furnished after as well as before its execution.

Vendors who permit a purchaser who has failed to comply with the terms of his purchase to continue the expenditure of money in making improvements after the expiration of the time

for payment cannot by notice terminate his interest in the property so as to cut off the lien of a carpenter employed by the purchaser to erect buildings on the land, but the latter may enforce his claim subject to the right of the vendors to recover the purchase money.

The right to a mechanics' lien is not an estate or interest in land which must be surrendered or released in the manner provided by law for such estates or interests. Where a release names no person to whom it is made and expresses no consideration, evidence may be given to show the consideration and to determine in whose favor it was intended to be made. It was recently agreed that where it was mutually agreed between the owner and the contractor that he should stop work and receive pay for what was already done, and the contractor thereupon signed a paper releasing the owner from further liability, this did not amount to a release of the lien for what was then done.

A contractor who under one general contract with the owner constructed upon contiguous lots two separate buildings, each requiring the same amount and character of labor and material, after having been paid more than half the contract price released one of the houses and lots from his lien under an agreement with the owner that he should retain a lien on the other for the balance due on his contracts. It was held in this case that the contractor could file and enforce his lien on the remaining house and lot for the entire balance due him where there were no third persons whose interests were affected by the lease.

In conclusion, there remains to be considered the effect of a release. A release by a contractor of his lien for erecting a building, as against a mortgagee receiving his mortgage on the faith thereof, covers the claims for all work done on the building whether before or after the release was executed. Where a contractor who is responsible for the erection and completion of a building according to terms agreed on executes a release of all claims for mechanics' liens, neither the contractor nor the sub-contractors and material men are entitled to liens. Even though sub-contractors may have released their lien, if the contractor fails to complete his contract, and they are subsequently employed by the owner to complete certain work, they can enforce a lien for what is done under the latter employment.

A conditional release is not effective unless the terms upon which it is conditioned are complied with by the person asserting a right under it. A release of the lien as to part of the property covered thereby does not destroy the lien on the rest of the

property. However, if one building is released an item for work or materials therein cannot be included in a lien on the remaining buildings.

Under those statutes which conform to the system prevailing in Pennsylvania, the right of a sub-contractor, material man, or workman to a lien is not dependent upon the state of accounts between the owner and contractor, and hence the lien is not defeated or affected by any payment to the contractor.

MONEY.

Defined—Loaned—Paid—Received—Legal Tender.

THERE is no more popular subject of interest than money, and we will endeavor to apply the important legal principles concerning money loaned, paid and received, which principles it is most essential to carefully bear in mind.

Money is defined as a universal medium or common standard, by comparison with which the value of all merchandise may be ascertained. In its strict technical sense it is coined metal, usually gold or silver, upon which the Government stamp has been imposed to indicate its value. In its more popular sense, any currency, tokens, bank notes or other circulating medium in general use as the representative of value.

A bequest in a will of money does not include securities—nothing passing except coin, lawful currency and funds deposited in the bank for safekeeping. It has been held that a savings bank deposit, being of the nature of an interest-drawing investment, not subject to the immediate order of the drawer, does not pass by a bequest of money in a will. Some courts have held that the word “money” will pass any sort of personal property in order to carry into effect the intention of the testator, and so notes, bonds and mortgages have been included under the word and in one case the proceeds of realty. In general, however, the term “money” is more restricted.

A legal tender is an offer to do a thing conformably to the requirements of the law in the case, and money that may be validly offered in payment of a debt is legal tender. Under the Federal statutes gold coins, silver coins to the amount of five dollars in one payment, and coins of smaller denominations than one dollar (the aggregate of which shall not exceed ten dollars) shall be legal tender. United States notes in payment of all debts, public and private, except duties on imports and interest on the public debt, demand Treasury notes and interest-bearing Treasury notes (with the exception that the latter are not legal tender in payment of notes issued by a bank) are legal tender. National bank notes are legal tender in payment of taxes, excise duties, public lands and of all other dues to the United States except duties on imports. They are also legal tender of all debts

of the United States and in payment of debts due the national banks.

Express contracts to pay coined dollars can be satisfied only by the tender of payment of coined dollars, and judgments in suits brought on such contracts may be entered for coined dollars and parts of dollars, such contracts not being within the legal tender acts. A contract made in this country and to be performed here for the payment of a sum stated in the denominations for a foreign currency is a money contract the same as if made and to be performed in the country where such currency is legal money.

Where a contract for the payment of money is made in one country payable in the currency of that country and a suit for breach is brought in another, the plaintiff can recover such a sum in the currency of the country where suit is brought as approximates most nearly to the amount to which the party is entitled in the country where the contract was made, calculated by the real and not the nominal par of exchange. In order to show the value of foreign money the proof required is similar in kind to that necessary to show the value of chattels in a distant market, such as will enable the jury to express, in our money, the value of the sum shown by the proof to be due in foreign money. When payment of wages is made to an American seaman at a foreign port, in foreign coin, such coin is to be valued at its rate in the home port under the laws of the United States.

Money Lent.

As a general rule an action for money lent will lie wherever one loans or advances money at the request of another, the law implying a contract to pay therefor where there is no express contract. Where, however, money is lent for the express purpose of enabling the borrower to do some act prohibited by law, the lender cannot recover it; but money loaned on a contract made void by statute, the defect being in the form of a contract, and not in the essence of the transaction, may be recovered. An action for money lent cannot be maintained upon a collateral undertaking to guarantee advances to be made to a third person. So, too, where one party to a contract advances money on the contract, supposing that the other is able to perform his part, when at that time performance was impossible, the money cannot be recovered back in an action for money lent.

A loan of money is payable on demand where no time for

payment is fixed, and where one lends money to be repaid or applied as he may direct, if no direction be given, the promise to repay may be enforced without a demand. Where money is advanced on the faith of a contract for the delivery of a crop, and only a part of it is delivered, plaintiff may recover the amount received by defendant over and above the value of the part delivered, without a return or offer to return such part.

In an action for money lent the person or persons to whom the credit was given and also the person receiving the benefit of the loan are liable; and if a joint promise may be implied, the liability is joint. Money paid by one person to another is presumed, in the absence of any explanation as to the cause of payment, to be paid because due, and not by way of a loan; and where plaintiff gives another money which some time previously he received from that other, and the circumstances strongly tend to show that it was put in plaintiff's hands for safekeeping, it is not material error to charge that plaintiff's possession does not raise the presumption of ownership. Upon a certain loan two promissory notes were given, one with security and the other without; the legal presumption raised under such circumstances is that the aggregate sum was loaned to the maker of the notes, and that the lender agreed to look to him exclusively for the payment of the second note. Where the only evidence of a loan are drafts of the defendant on the plaintiff, and it appears that the drafts were drawn for goods consigned by defendant to plaintiff, and defendant sets up a counterclaim for a balance due on the goods, the case turns on the price agreed to be paid for the goods and the burden of proving this is on the plaintiff.

What evidence will be sufficient to establish a loan necessarily depends on the facts and circumstances of the individual case, and is a question for the jury. In a recent case A, upon the representations of B and C, advanced money on B's draft, and it was held that if C, although he made no wilfully false representations to induce the advance, yet received part of the money from B by way of division of the money, he would be liable for the amount so received. An I. O. U. is sufficient evidence in an action for money loaned, although it is not addressed, and no proof is given that U. means the plaintiff, except his producing the writing.

Money Paid.

An action for money paid may be maintained in every case in which there has been a payment of money by plaintiff to a third party, at the request of defendant, with an undertaking ex-

press or implied to repay the amount, and it is immaterial whether defendant is relieved from a liability by the payment or not. The request to pay and the payment according to it constitute the debt; and whether the request be direct, as where the party is expressly desired by defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference.

Although an action of assumpsit (the ordinary action to collect a debt) cannot be maintained upon the mere voluntary payment of a debt to another person, yet if one person, in order to protect his own interest, pays a debt for which another is legally and personally liable, the law will imply an assumpsit on the part of the latter to the former. A request will be implied where the consideration consists in plaintiff's having been compelled to do that which defendant was legally compellable to do. It is important to bear in mind the following principle of law: Where, in order to protect his property, real or personal, the owner pays off an outstanding encumbrance thereon, which another has undertaken or is legally liable to pay, he may recover from such other the amounts so paid by him in an action for money paid.

A person who has been compelled for the protection of his interests to pay taxes for which another is legally and personally liable, may recover the amount so paid from him whose duty it was to pay such taxes. It has been held that where the title to land is in dispute, and the taxes thereon are paid by one of the claimants, and the claims of the other party to the title are ultimately established, the money so paid as taxes must be refunded with interest.

Where one person, although himself under a legal liability, pays a sum for which another is primarily liable, he may recover from the latter the amount so paid. It is not indispensable ordinarily to an action for money paid that the payment should have been in money. A payment in any medium which the parties regard as equivalent to money, such as goods, chattels, securities, credits or services, is sufficient to support the action.

The giving of a bill of exchange or negotiable note for the debt of another may be regarded as payment and an action for money paid may be maintained. But since a mere obligation to pay is not the same as payment, a bond given for the debt of another is not such a payment as will support an action for money paid, and this is an important distinction to note. An action for money paid does not lie except upon a previous re-

quest or a subsequent ratification on the part of defendant or his authorized agent. But where money or its equivalent has been paid for the use of another, the request or ratification may be either expressed or implied. The request, as well as the promise, will be implied where the consideration consists in plaintiff having been compelled to do that which defendant was legally compellable to do, or where defendant has adopted and enjoyed the benefit of the payment. A request to one person to pay a sum of money will not authorize another, who advances the money, to recover it in action for money paid, brought in the name of the person to whom the request was made. It should be noted, however, that a mere voluntary payment for the benefit of another gives to the party so paying no right of action against the party for whose benefit the payment was made, unless the latter subsequently ratifies it.

Voluntary payments may be divided into two classes—sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed him to adopt or decline the benefit; in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended, but if he declines the benefit he will not be liable. But sometimes money is expended for the benefit of another person under such circumstances that he cannot help accepting the benefit; in fact, he is bound to accept it; in this case he has no opportunity of exercising any option, and he will be under no liability to repay money advanced on his behalf.

Where two persons from their common funds have paid a debt of another, they may maintain a joint action of assumpsit for the money paid; but where a judgment against a firm, which a third person has agreed to satisfy in consideration of a receipt of the full amount thereof, but fails to do so, is paid off by one partner individually, he may recover from such third person in an action for money paid without joining his partner as a party plaintiff. The measure of damages in an action for money paid for the use and benefit of another is the sum actually paid by plaintiff together with interest from the time of payment.

Where, whether through wrong, inadvertence or mistake, one person is wrongfully credited on account or in settlement of accounts with the payment of money to which another is, in equity and good conscience entitled, the latter may maintain an action for money had and received to his use against the person so credited. Thus an agent who has settled an account with his principal, as having been paid by himself to the creditor, is liable

to the latter as for money received to his use. So likewise where an attorney or agent has discharged a debt due to his principal, and applied that debt to pay his own debt, the amount of the debt so discharged may be recovered by him.

In connection with the subject of money loaned and received, the Legislature of Pennsylvania at its recent session enacted a law permitting money loan companies or individuals operating under a license to charge, in addition to six per cent. interest on the amount of money loaned, a ten per cent. brokerage fee.

The question in an action for money had and received is: to which party does the money in equity, justice and law belong? All that the plaintiff need show is that the defendant holds money which in equity and good conscience belongs to him.

The rule is well settled that an action for money had and received will lie to recover money paid by the plaintiff to the defendant for a consideration which has wholly failed, unless the failure of consideration is due to some fault on the part of the plaintiff himself. Money paid under a mutual mistake as the price of that which has no legal existence or validity may be recovered back as paid without consideration where the vendor is responsible for the mistake or represents a person so responsible. Where one person has received money as an indemnity in which another has a right to share, the latter may maintain an action for money had and received for his portion. Likewise an action for money had and received may be maintained by one tenant in common to recover his share of the proceeds of the common property, real or personal, from his co-tenant, by whom they have been received.

In order to support an action for money had and received, there must be some privity existing between the parties in relation to the money sought to be recovered. This privity may, however, be either implied or express. The weight of authority is to the effect that no further privity is required than that which results from one person's having another's money which he has no right conscientiously to keep. In such cases the law implies a promise that he will pay it over. Privity in this connection exists between one who receives money or its equivalent under a promise or duty to pay it over to a third person. When money to be paid on a contract under seal is, by the terms of the contract, made payable to one not a party thereto, such person may sue in assumpsit for money had and received, using the sealed instrument as evidence of his right to recover.

Where there are two claimants for the same money and one of them is recognized as being entitled to it by the person from whom it is due, and is paid, the other cannot sue him to recover the money, for the reason that having received the money under a claim of right in himself, the law will not imply any contract or promise by him to hold the money for the use of the other claimant, or to pay it over to him, and, therefore, there is not, under the circumstances, any privity of contract on which to found the action. However, where the liability of the person from whom the money was due has been discharged by payment to one claimant who does not assert any hostile claim to the whole amount, it has been held that another claimant who is rightfully entitled to share in the money may maintain an action for money had and received against the claimant so paid.

Numerous Contingencies.

If an agent is employed by several principals, the common employment creates a relation and privity between the principals such as will sustain an action for money had and received by one against another to recover money belonging to the former and paid over by the agent to the latter. One in whose behalf money is borrowed without authority but to whose use it is applied by the borrower is not liable to the lender as for money had and received.

As a general principle of law, to sustain an action for money had and received, it must appear that the money in question belonged to plaintiff; that it was secured by defendant without plaintiff's consent and without giving any valid consideration, or if with plaintiff's consent, upon a consideration which has failed. Any surplus arising on the sale of a security for a debt may be recovered in an action for money had and received by the person entitled thereto, whether the original debtor or a subsequent mortgagee.

In cases where property is conveyed by a debtor to a trustee to be sold for the benefit of creditors who sells the property for more than enough to satisfy all claims, a creditor for whose benefit the trust was created may maintain an action for money had and received against the trustee. Such an action will also lie against one who has received double payment, to recover the overplus.

It frequently happens that one person receives money from another for a particular purpose, and neglects or refuses to apply it to such purpose. If such be the case, the money may be

recovered back in an action for money had and received. This same rule applies where money is received for a purpose which is afterward abandoned or which cannot be accomplished.

An action for money had and received will always lie where one has obtained money from another by oppression, imposition, extortion or deceit, and the law implies a promise from such person to return it to the lawful owner, whose title thereto cannot be annulled by the fraudulent or unjust dispossession. Money paid on a raised check may be recovered where the one seeking recovery has not by negligence prejudiced the rights of the person from whom recovery is sought.

In an action for money had and received it is immaterial how the money may have come into defendant's hands, and the fact that it was received from a third person will not affect his liability, if in equity and good conscience he is not entitled to hold it against the true owner. It has been decided that in order to sustain the action under consideration it is not necessary that a payment made to defendant by a third person with plaintiff's money should have been involuntary, but only that it should have been made without plaintiff's consent. Where, however, one who has embezzled money transfers it to another in due course of business, mere ground of suspicion of defect of title or knowledge of circumstances which would excite suspicion in the mind of a prudent man or gross negligence on the part of the transferee will not defeat his title as against the owner, the test being honesty and good faith on the part of the transferee and not diligence.

An action for money had and received cannot be resorted to where there is a special contract open and unexecuted and the breach of the contract is the basis of the action. Even though a special contract exists if it has been completely executed so that only the duty to pay money remains, a recovery may be had in an action for money had and received. So likewise the action lies where money is deposited upon a contract by which the depositor undertakes to do something and the contract is wholly unperformed. Where a broker disobeys instructions in selling grain which he has bought for his principal, deposits made by his principal as security may be recovered in assumpsit. So money deposited with another as security against loss from any decline in the value of goods to be purchased for the depositor may be recovered in an action of assumpsit if the party purchasing the goods neglects to sell them according to instructions of the depositor.

Persons Entitled and Liable.

It is only one having the legal title to the money in whose favor the law raises a promise to pay and who may maintain an action for money had and received. The action may be maintained by a trustee and lies in favor of a personal representative either in his own name or in his representative capacity. Where the cause of action accrued after his decedent's death and the money if recovered would be assets, so an administrator who has paid to a distributee an amount in excess of what was due him, and has made a final settlement of his accounts, may maintain an action for the excess in his own name, since he is personally chargeable with the excess. One who purchased real estate subject to an encumbrance which he supposed to be valid and who afterward paid it off cannot maintain an action to recover back the amount of such payments upon discovering that the encumbrance was procured by fraud, as he was not the party defrauded. One who at another's request advances money for him, being entitled to look to the latter or his estate for reimbursement, cannot maintain an action for money had and received against the person to whom the money was advanced. It has recently been held that an action for money had and received cannot be maintained by a corporation to recover a sum of money received by a former director as a bribe for resigning his office and procuring control of the corporation to be turned over to the purchaser for corrupt purposes.

An action lies against one into whose hands money actually belonging to the plaintiff can be traced, as well as where he received the money in the first instance. The recovery, however, is limited to cases where money is received for the plaintiff by some one standing in a fiduciary capacity to the plaintiff. An action for money had and received may be sustained against an agent who has received money to which the principal has no right, if the agent has had notice not to pay it over. But if the money is paid over with intent to pass it to the credit of the principal, before notice is given to the agent, no action will ordinarily lie against the latter for its recovery.

If a debtor places money which he owes his creditors in the hands of his agent or servant to discharge the debt, the creditor may maintain an action against the servant or agent if he retains the money.

But if, after money has been placed by the debtor in the hands of an agent to be paid a creditor, the creditor fails to sue

the agent until the debtor recalls the money in his hands, the creditor can maintain no action against the agent. If a debtor makes an overpayment to the creditor's agent, through mistake, and the money is transmitted by the agent to the principal, the agent is liable to the debtor for the excess in an action for money had and received.

If the money is obtained by the agent by compulsion or extortion it seems that an action will lie against him, although it has been paid over to his principal, unless the payment was made expressly for the use of the principal.

The rule is quite elementary that to enable a person to maintain an action for money had and received, it is necessary for him to establish that the person sought to be charged had received money belonging to him or to which he is entitled; that is the fundamental fact on which the right of action depends.

Where money is sent to the treasurer of a corporation for stock which is never delivered, the corporation and not its treasurer is liable.

If money is paid through mistake to plaintiff's wife, in his presence with his consent and approval and he knew she was not entitled to it, he is liable therefor in an action for money had and received.

In order to enable a party who is entitled to rescind a contract on account of failure of consideration or non-performance of the other party, to bring an action for the money which he has paid on account of it, he must restore or tender what he has received in part performance, unless the right is waived.

One who receives money in advance on a contract which he is without authority to make, and which he afterward refuses to fulfil is liable without any previous demand. The doctrine is stated in a number of decisions and text-books that where there is a debt or duty to pay money presently, not dependent on any contingencies, an action may be brought without any previous demand. Otherwise a previous demand is necessary.

In a recent case A, having a draft on a bank in New York, for \$1,000, two-thirds of which belonged to himself and one-third to B, put such draft into the hands of B, to receive the money thereon and to divide the avails in that proportion, and B received the money, and after a reasonable time had elapsed A sought to recover his share in an action for money had and received, against B, without previous demand or request, it was held that no such demand or request was necessary.

Where one had money belonging to another rightfully and

lawfully in his possession the law requires that it should first be demanded of him before an action can be maintained against him therefor. Thus where one receives money as trustee, and does nothing amounting to an abuse of the trust or inconsistent with the understanding or agreement of the parties, he is not liable in an action for money had and received without a previous demand. However, if there has been an abuse of the trust no demand is necessary.

If a bank upon which a check is drawn payable to a particular person or order pays the amount of the check to one presenting it, with a forged endorsement of the payee's name, both parties supposing the endorsement to be genuine, a right of action to recover back the money accrues at the date of the payment, and the Statute of Limitations begins to run from that date.

EXECUTORS AND ADMINISTRATORS.

*Appointment and Qualification—Ancillary Administration—
Powers and Duties—Assets of Estate—Claims Against—
Accounts—Discharge.*

IT IS quite customary for business men, in disposing of their property, to appoint business associates executors or trustees, with power to conduct or manage their affairs for particular purposes and for limited periods of time. Although the majority consult attorneys with reference to their duties under such appointments, it is quite essential that those acting as executors, administrators or trustees should possess a knowledge of the general principles of law governing their qualifications, duties, etc. It will consequently be our object to discuss briefly the law on this subject, which is of general interest to business men.

When a person dies leaving property, his estate is usually set apart to be administered or settled under the immediate supervision of the courts. The main objects of such jurisdiction are that the personalty of the deceased, together with income and profits, be properly collected, preserved and duly accounted for; that his just debts and the charges consequent upon his death and the settlement of his estate be paid and adjusted, and that the residue of the estate be distributed among such persons and in such proportions as the will of the deceased, if there be one, or if not, the statutes of distribution, commonly known as the intestate laws, may prescribe.

The duty of settling and distributing the estate is vested in persons who are termed the personal representatives of the deceased. They are of two classes, executors and administrators.

Definitions.

An executor may be defined as the person to whom the execution of the last will or testament of personal estate is by the testator's appointment confided. An administrator is a person authorized by a competent Court to manage and distribute the estate of an intestate, or of a testate who has no executor. This definition is given in Bouvier's Law Dictionary, except the phrase "by a competent Court." This phrase is necessary to the com-

pletion of the definition, for the administrator derives all his authority from the Court which appoints him.

An executor is not vested with any title or power until he becomes so vested by letters testamentary. When a testator by his will devises his real estate to an executor in trust, to recover the rents and profits, or to accumulate the same, such executor takes as trustee by devise the instant the testator dies, and becomes vested with all the estate and all the power conferred in respect to the same. When a testator devises his real estate to his executor in trust to sell the same to pay debts or legacies, the executor takes no estate by the will, as trustee or otherwise. It is a mere power, and is an incident of the office of executor, as executor enabling him to convert into actual personalty that which is made equitably so by the will.

Administration means the management of the estate of a decedent and expresses the jurisdiction assumed by the proper Court over it. It includes more than the mere collection of the assets, the payments of debts and legacies, and distribution to the next of kin. It involves all that may be done rightfully in the preservation of the assets, and all which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights; and it includes all which may be done in relation to adverse claims to assets which have come to the possession of the administrator as the property of the intestate.

Two Classes of Estates.

The estates of deceased persons fall into two classes; first, testate, which includes those estates as to the settlement of which the deceased has left directions embodied in a will, in which case the deceased is termed the testator; and, second, intestate, which includes the estates of persons who have left no wills. The term "intestate" is also used to designate a person who has died without leaving a valid will. There may, however, also be cases of partial intestacy where the deceased has left a will containing directions as to the disposition of a portion of his property, but where a portion is left undisposed of.

It is a general principle of law that real estate descends directly to the heir of the decedent, and that personal estate passes to the personal representatives of the deceased. Nevertheless debts and charges remain obligatory upon the estate so long as property of the deceased may be found for their satisfaction,

and hence if the personal assets prove insufficient, the real estate may be applied to make up the deficiency. Administration is usually a necessity where a person dies leaving unpaid debts and property which may be made available to pay them, and where a person claims to be a creditor of the estate and applies for the appointment of an administrator, it is not necessary that he should conclusively prove the existence of the alleged debts, but if he makes a *prima facie* case this is sufficient to authorize and require the appointment of an administrator. However, in order for an alleged debt to form the basis of a grant of administration, it must be a legal claim upon the deceased or his estate.

The law of executors and administrators will be considered in the order of their appointment and qualifications, their powers and duties, termination of their office by removal, revocation or resignation, and last, the remedies pertaining to their office, including actions by and against them, etc.

If the deceased has left a will, appointing an executor, the will should be probated as soon as possible. The general rule of law is that the place of a decedent's last domicile shall determine the probate jurisdiction to grant letters and supervise the settlement of his estate, and the sole, or at least the principal, grant of letters ought to be taken out and the will proved in the country, the State, and, indeed, the very county where decedent was domiciled at the time of his death. In case one dies while traveling outside the State or country of his domicile, the foreign Court has no jurisdiction, although one who roams after leaving permanently one domicile has been held to have settled down where he died. In Pennsylvania the will should be deposited as promptly as possible after death with the Register of Wills "of the county within which was the family or principal residence of the decedent at the time of his death, and if the decedent has no such residence, then with the Register of the county where the principal part of the goods and estate of such decedent shall be." The Pennsylvania statutes do not require two subscribing witnesses to the will, but if there be subscribing witnesses they should be called to prove the same. In any event two witnesses must prove the signature to the will.

When no will is left and there are no creditors of the estate or the creditors agree, distribution of the estate may be had without recourse to the courts, by agreement of all interested parties, being of full age and competent, provided no necessity exists for bringing suit to collect the property or for other purposes, such

as the formal transfer of title. The existence of a will appointing an executor generally renders it necessary for the estate to be settled through the courts, which alone have cognizance of such matters, although in several States statutes have been passed which provide that, if the testator so requests in his will, the will may be carried out by the executor without any probate, or with probate and without further proceedings in Court, according as the special statute may be worded.

In case of intestate estates there is no reason why the estate should be put to the expense and delay of taking out administration in cases where it is in such shape that this mode of settlement can be employed without injustice or irregularity. Therefore, if there are no creditors and all the parties entitled to the estate as distributees are of age and competent to transact business, and agree to divide up the estate without taking out administration, and the property is of such a kind as not to require formal transfers, such as would be necessary in transferring shares of stock in corporations or deposits in savings banks, and is in the possession of the distributees, so that no suit at law is necessary in order to recover possession of it, then by agreement among the persons entitled to distribution the estate may be divided up among them without the appointment of any administrator. If distribution is once made under such an agreement, none of the distributees can afterward require administration, because of the estoppel of their agreement to divide without administration. If, however, there are any creditors of the estate who are not satisfied with this method of settling the same, and insist on the appointment of an administrator, they can compel this to be done, or in default can take administration themselves, since they are entitled to have some one appointed representing the estate whom they can sue for their claims, or else to be themselves placed in such a position that as administrators they can satisfy their own claims.

Appointment and Qualification.

As we observed before, an executor derives his authority from the will appointing him. The interest of every executor in his testator's estate is what the testator gives him, and a testator may make a trust absolute or qualified respecting either the subject matter, the place where the trust shall be discharged, or the time when the executor shall begin or during which he shall continue to act as such. The executor's appointment also may be

made conditional, as upon his giving security for paying the debts and legacies, or possessing certain qualifications at the time of the testator's death, and unless the conditions are fulfilled the nomination goes for naught.

Where several executors are named or designated together, they are intended to be co-executors and should be qualified together, all being thus legally regarded as an individual in place of a sole executor, and of various persons named as co-executors he or they who may be alive and willing and competent to accept the trust on the testator's death can alone be deemed qualified for the office. Instead of appointing co-executors to serve together, a testator may name two or more, substituting one after another in order, so that if the first dies or cannot act, the next may act and so on. A direction in a will that if the executor appointed thereby should die, a certain other person should be his successor with all the authority and power that he would have had if appointed in the first instance, requires the appointment of such person, although it occurred after testator's death.

Where a will is proved, it is the duty of the Court to issue letters testamentary to the person named as executor upon his application. As a general rule of law, all persons who are capable of making wills are capable of becoming executors, and the law even extends further than this. An infant, although not of full testamentary capacity, may be appointed executor, but the statutes in most States disqualify an infant from performing the functions of a sole executor, so that some other person must be appointed administrator until the executor reaches his majority. The fact that a person named as executor is an alien or a non-resident does not disqualify him to act as executor. If an executor does not wish to perform his duties, and the law cannot compel one nominated as executor to act as such, the safest policy is to file a written renunciation.

An executor cannot assign the office to another, since no one to whom a power relating to property is given by another on account of a special and personal confidence can delegate that power to another.

Administrators.

Statutes in the various States regulate the right of particular persons to administer on the estate of a decedent, and the priority of right between two or more persons who ask for the issuance of letters to them. The principle which underlies the right

to administer is that the grant of letters of administration shall be made to the person or persons to whom the personal property of the deceased, intestate, or the greater part of it, descends as distributees. In Pennsylvania it is provided that letters of administration shall be granted to the widow or surviving husband of the testator, as the case may be, or to such of his or her relations or kindred as by law are entitled to the residue of his or her personal estate, after payment of his debts. Of those so entitled, preference is first given to such as are in the nearest degree of consanguinity with the decedent, males being preferred to females. In case of the refusal or incompetency of every person letters of administration may be obtained by one or more of the creditors of the decedent applying therefor.

The principle that the right to administer the estate follows the right to the estate in distribution has been recognized quite universally, the reason being obvious, in that it gives the management of the property into the hands of the person or persons who will ultimately own it, and whose claim upon it is only deferred until the creditors of the deceased are paid, when the property will be vested in those entitled.

The right of the husband to administer upon his wife's estate, whether this right is given by a statute or decision, depends upon the existence of a valid marriage between him and the deceased at the time of her death. Consequently if the marriage supposed to exist between them is void for any cause the supposed husband has no right of administration. Thus if there was a prior existing marriage, or one of the parties is *non compos mentis* or under age of lawful marriage, the supposed husband has no right to administer. If, however, there has been a valid marriage which has been dissolved, as, for instance, when a divorce has been granted dissolving the marriage for desertion, etc., he loses his right to administer. It should be noted that no misconduct of the husband toward the wife bars his right to administer, even if it is of such a nature as to afford ground for a divorce, unless a divorce has actually been obtained.

We noted that in case of the death of a husband, without leaving a will, his widow is first entitled to letters of administration upon his estate. If the widow renounces, or is incompetent, no one can be appointed but one or more of the next of kin, if competent and willing. The widow's right to administer her husband's estate depends upon the legitimacy of her marriage and its existence at her husband's death. If it is void or has been dissolved by divorce she cannot claim the right to administer.

There must be proof that the applicant for letters of administration is the widow of the deceased, if this fact is denied. Marriage may be proved by evidence of cohabitation, declarations and repute. If the only evidence of this point is the presumption arising from cohabitation, the evidence as to the cohabitation must not be such as to make it doubtful whether the cohabitation was lawful or illicit. In a case in Pennsylvania the testimony of the widow to the marriage, corroborated by an entry in the family Bible by the deceased and a cohabitation and reputation of marriage for twenty years, was held to be ample evidence of a marriage though contradicted by admissions of the widow and husband that they were not married. In some States the Court is given a choice to appoint either the widow or next of kin. In such States the widow will not be appointed where she has eloped from her husband, or cohabitated with another man, or deserted or lived separate from her husband. But if the widow is so entitled to the office a separation does not bar her right, although by articles of separation or any ante-nuptial contract she agreed to renounce all interest in her husband's estate. A divorce obtained by the husband through fraud, as where he deserts his wife and moves into another State, and there sues and obtains a divorce from her, does not deprive her of her right to administer according to a recent decision of the Supreme Court of Pennsylvania. If a widow expressly renounces and disclaims her right, and refuses to take administration, she waives her right, and will not afterward be allowed to cause letters issued to a third party to be revoked.

Next of Kin.

Neither husband nor wife can be regarded as next of kin one to the other, by virtue of the marriage tie alone, and this reservation extends to all marriage connections, since common blood is the test of consanguinity.

The right to administration arising from kinship being usually dependent upon the right to share in the distribution of the decedent's estate, the nearest of kin to the decedent are as a rule preferred to those more remotely related. From among two or more persons equally akin to the deceased who seek appointment as administrator, the Court may choose the most suitable. The policy of some States, such as Pennsylvania, as was pointed out previously, distinctly places the male next of kin before the female for receiving the appointment.

The next of kin of the deceased are ascertained by computation according to the method of the civil law. In a few States computation is made according to the rules of the common law which are the same as those of the canon law, that is, to begin at the common ancestor, and reckon downward, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus A and his brother are related according to the common law in the first degree, for from the father to each of them is counted only one step. A and his nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor, that is, his own grandfather, the father of A.

The method of computing the degrees of kindred in the civil law is to count upward from either of the persons related to the common ancestor, and then downward again to the other, reckoning a degree for each person ascending and descending. For example, A and his brother are related according to the civil law in the second degree, for from A to his father, the common ancestor, is one degree, and thence descending to the brother is another degree. A and his nephew are related in the third degree, for ascending from A to his father is one degree, and descending thence to his brother is a second degree, and to the brother's son a third degree. So a grandfather is by the civil law nearer of kin than an aunt, for it is two degrees to the grandfather, while to the aunt it is one degree more, that is from the grandfather to the aunt. It is important as a matter of practical education to understand the method of computing the nearest of kin in a family. In Pennsylvania this is done according to the rules of the civil law as above explained. Maryland is the only State in the east, I believe, where the rules of the common law are adopted. If one dies leaving parents but no children, the parents are of the first degree, and their rights are accordingly superior to those of brothers and sisters, who stand in the second degree, and they will accordingly be preferred upon their application for letters of administration.

Illegitimate and adopted children have no right to administer unless this right is specially conferred by statute. It often happens that several relatives will be found to be equally near in point of kinship to the deceased, and the question then arises whether administration shall be granted to all, or if not to all, to which of them it shall be granted. In deciding upon this point the Court has discretionary powers, but there are several princi-

ples of preference which are so important and are of such general application as to deserve notice.

In the first place, it may be laid down as a leading principle that the Court will ordinarily appoint only one administrator, as the existence of two or more renders the proceedings too complicated. Even when the parties interested are willing, and there are two applicants, a Judge is not bound to make a joint appointment, but may in his discretion appoint only one.

Ordinarily the half-blood is admitted with the whole in determining the next of kin, but if among several of equal degree some are of the half-blood and some are of the whole, the latter will generally be preferred in the appointment of an administrator. However, a brother of a half-blood is generally preferred to a sister of the whole blood, because a male administrator is preferred to a female. As between a married and an unmarried woman of equal degree of kinship to the deceased, the unmarried woman will be preferred. A resident of a State is usually preferred to a non-resident. It need hardly be said that an elder child does not stand in a nearer degree of kinship than a younger one, but an elder son will be preferred to a younger merely as a matter of discretion of the Court.

Letters to Creditor.

Statutes in most States generally provide for the appointment of a creditor of the deceased as administrator where no application is made within a suitable time by those having legal priority, or where the latter prove incompetent. Questions have frequently arisen as to what constitutes a creditor under the law in the present connection. One whose claim against the estate is for the funeral expenses is a creditor of the estate, such as an undertaker or a relative who has paid the bills for the funeral. But one who was a creditor of the deceased by virtue of a cause of action which does not survive—as, for example, a breach of promise of marriage—is not such a creditor as is entitled to administer the estate. The person applying for letters as a creditor must show that he has a valid claim against the estate of the decedent, and if the facts which he alleges do not constitute a valid debt, his application will be denied. To illustrate, where one claims to be a creditor for money loaned on stock of a company, and the transaction proved to be a purchase by him of stock of the company from the deceased, as treasurer of the company, it was held that these facts constituted no debt of the deceased,

but, if any, one of the company, and therefore the applicant had no right to the appointment of administrator.

Where a decedent has left a will, but such will does not nominate any executors, or none of the persons named as executors can or will act as such, the Court appoints a person to perform the necessary duties connected with the settlement of the estate, and such appointee is termed an administrator "with the will annexed." Mention should be made of the right of the residuary legatee (person named in the will to receive the residue of testator's estate) to letters of administration with the will annexed, in preference to either surviving husband, widow, next of kin or creditors. This right is based upon the governing principle that the person most beneficially interested according to the terms of the will should have the preference. If the residuary legatee is dead, or renounces, or is incompetent, the grant of letters of administration will go to the other legatees, in accordance with their interests.

Sometimes when the interested parties are making a contest as to who should distribute the estate, a temporary administrator is appointed, and in case of such appointment the principle that the grant of letters follows the interest in the estate has no application, for the object of the grant of letters is merely to put the estate in safe custody while the parties interested are in litigation.

As a general rule the right to administer cannot be assigned, as it is purely personal. By statutes in many States, including Pennsylvania, those persons entitled to appointment as administrators may nominate others in their place. The right of persons who are entitled to administer, but who reside out of the State, to appoint some resident of the State to take administration in their stead, is in some States recognized, at least as far as a surviving husband, widow and next of kin are concerned. By statute non-residence in a State renders the person otherwise entitled to administer incompetent, and in such case his appointee is also incompetent. A non-resident, in such a case, if he wishes to gain a right to nominate, must become a *bona fide* resident of the State, which involves actual residence in the State and intention to become a resident. The Court will judge upon all the evidence whether a non-resident has become a *bona fide* resident. Thus where a person came into Pennsylvania upon his brother's death, to look after his affairs, and stayed a few days, bringing his daughter with him and leaving his wife in his former residence, and then applied for letters of administration for his nominee, the Court held that he had not gained a *bona fide*

residence, although he testified directly that it was his intentions to become a resident when he made the change, but he could not say how long he should keep the residence thus acquired.

Acceptance or Renunciation.

The offices of both executor and administrator may be either claimed or accepted by the person or persons entitled to them, or may be renounced by them. If a person entitled to either office expressly renounces the right, or neglects to claim it after being duly cited into court for that purpose, he forfeits the right. An executor may expressly accept the office in writing, or by applying for appointment in accordance with the will. It is not generally held that the executor is bound to accept the office for merely intermeddling with the estate, and it is said that a trusteeship, whether as executor or otherwise, cannot be imposed upon any party except by his own consent, or as a consequence of his own acts. Delay and inaction are generally treated as evidence of refusal. Even if a person named as executor, together with others, pays the funeral expenses, this does not, according to the Supreme Court of Pennsylvania, amount to an acceptance of the trust.

The question has arisen in several cases whether a contract to renounce for a valuable consideration the office of either executor or administrator is a valid one. The weight of authority holds that such a contract is illegal because it would introduce so much uncertainty as to who would finally administer the estate, and a testator would feel no confidence that the person whom he had named as executor in his will would finally be the one to dispose of his estates. Therefore, the courts will leave the parties in the condition in which they have put themselves. A contract to pay one a sum of money for acting as administrator is legal, and so is a contract to act as administrator without making any charge for services.

Foreign Administration.

We have heretofore considered the appointment and qualifications of executors and administrators. In this connection it is timely to consider briefly foreign and interstate administration before discussing the duties of executors and administrators.

The appointment of an executor or administrator to his office is in effect creating an officer of the Court, and his power and authority, being derived from the Court, can have no absolute

force beyond the limits of the State or country which has created the Court appointing him. Frequently it happens, however, that decedents leave property situated in several States or countries. Questions then arise as to the legal method of carrying out a will relating to such estate or of administering the estate in case of intestacy.

It may be laid down as a general principle that the validity of a will of personal property is decided by the laws of the country or State in which the testator was domiciled at the time of his death. If the will was valid, either in general as to personal property or in regard to any special bequests of personal property in the country in which the testator was domiciled at the time of his death, then it is so far valid in any other country or State. This rule is merely an application of the general principle that movable property follows the person of its owner, and is governed by the laws of the place where he has his domicile. An apparent exception to this rule is found in the rule that where a power of appointment as to personal property is given, to be exercised by will, and the power is exercised by a will executed in a manner and form which is valid in the State where the personal property is situated, but not valid at the domicile of the testator, this will is considered to be a good execution of the power. It should be noticed, however, that the question in this regard does not concern the validity of the will, but rather the execution of a power in regard to which the courts are strict in holding that it must be correct in every particular, according to the law of the place where the property is situated. The rule governing the question of domicile we have considered in connection with the jurisdiction of the courts to grant letters of administration. It is important to bear in mind that, since the validity of a will of personal property depends upon its validity at the domicile of the testator, and not at the place where the will was originally executed, it follows that if the testator changes his domicile after making the will, into a country where the will is invalid and dies there, the will is invalid everywhere.

The validity of a will of real estate, as to the capacity of the testator, form and execution, depends upon and is governed by the law of the place where the land or real estate is situated.

Probate of a will in one country is conclusive of the validity of the will in all other countries. The judgment of a Court of probate allowing the proof of a will is binding upon the rights

of all persons interested in the property named, although they are not named as parties in the case. The duty of a probate Court when a will is offered to it for probate which has already been probated in a foreign country consists in deciding whether the record presented is duly authenticated, whether the Court in which the will purports to have been allowed had jurisdiction, and whether there is any estate, real or personal, in the county in which the will may operate, and also as to actual fraud in obtaining the probate of the will, and as to all facts necessary to the establishment of a will. But as to the regularity of the proceedings, and their conformity to the laws of the country or State where they are had, both by the Constitution of the United States and by the common law, the judgment must be conclusive, as each State is required to give such effect to the judgments of the different States. Among the questions which are settled by the foreign probate are the capacity and sanity of the testator, including the power of a married woman to make a will, the due execution of the will, the competency of the witnesses and the regularity of the proceedings for probate.

As to wills both as to personalty and to real estate, they are to be interpreted according to the laws and customs of the country or State of the domicile of the testator, since he is supposed to have been conversant with those laws, customs and language.

Principal and Other Administration.

The main rule or essential point of the rules relating to administration in various jurisdictions is that the administration which is taken out in the country or domicile of the deceased is the principal administration. Any other administration is ancillary, whether it may or may not be prior in point of time to the administration in the domicile of the deceased. The reason for this distinction is evident in the fact that the personal estate, which is the basis for administration, is governed by the laws of the domicile of the deceased, and all questions as to the settlement and distribution of that estate should be settled by the laws of that country or State.

Questions arising as to the administration of an estate which is located in various States are often complicated. Although the words "principal" and "ancillary" seem to imply a relation of dependence between the several administrations, this is not the

fact. Each administration is wholly independent of the other, and the executor or administrator appointed in the ancillary jurisdiction has as complete and exclusive authority therein as the principal one has in the State of domicile. Ancillary administration may be granted although there be no principal administration.

Ancillary administration being necessarily that of a non-resident, the taking out of such administration depends upon the existence of assets in the county where such administration is applied for. Hence if there are no assets in the county where application is made there cannot be any grant of letters, nor will letters be granted upon petition of a non-resident creditor, if there are assets but no resident creditors. The Supreme Court of the United States has laid down definite principles governing ancillary administration. These rules are of general application throughout the United States, the substance of which may be thus stated:

Every ancillary administration upon principles of international law is made subservient to the rights of creditors, legatees and distributees in the country where such administration is taken out, although the distribution as to legatees and distributees or heirs is governed by the law of the place of the testator's or intestate's domicile. The important question frequently arising is what is to be done as to the residue of the assets, after discharging all the debts and other claims of the deceased, due to persons resident in the country where the ancillary administration is taken out? Is it to be remitted to the domicile of the testator or intestate, or be there finally settled, adjusted and distributed among all the claimants according to the law therein pertaining, or may creditors, legatees or distributees of any foreign country come into the courts of the country granting such ancillary administration and there have all their respective claims adjusted, and in cases of insolvency or other deficiency of assets, what rules are to govern in regard to the rights, preferences and priorities of different classes of claimants under the laws of different countries seeking such distribution of the residue?

It seems now to be understood, as the general result of authorities, that courts of equity of the country where the ancillary administration was granted are not incompetent to act upon such matters and to decree a final distribution of the assets to and among the various claimants having rights in the funds, whatever may be their domicile.

Therefore, where a decedent having property in Pennsylvania dies domiciled in another State, where his will was duly proved or letters of administration granted, or if a foreign executor or administrator wishes to bring an action in Pennsylvania to recover or follow assets, it is necessary to apply to the Register of Wills of the proper county for ancillary letters of administration. If the decedent died intestate, the certificate of the proper officer granting the letters of administration duly authenticated under the act of Congress, must be filed with the Register of Wills of the proper county in this State before securing ancillary letters.

Administrator's Liability.

The principal and ancillary administrations are, as we have noted, distinct in regard to the assets which are to be administered in each. Each administrator is liable for and bound to inventory and administer all the assets of the estate of which he has knowledge, except those which lie within the jurisdiction of some other administration. Consequently if one who is appointed administrator in the State where the deceased resided takes ancillary administration in another State, he is not liable in the latter State to creditors residing there for assets in his principal administration. Nor is he liable to creditors in other States in which he has not taken administration. When there are assets in several States, and administrators in all of them, the assets found in each State are administered in that State. Thus, if a creditor by simple contract debt lives and dies in one State, and the debtor lives in another, and administration is taken out in both States, the debt is assets where the debtor resides, and a payment to the administrator appointed in that State will be a good discharge everywhere. Should an administrator pay a debt in one State, he would be allowed the credit in his accounts though the debt accrued in another State.

In cases where there is only one administration, and that is at the domicile of the testator or intestate, and the estate consists of property lying in several States, it is not improper for the executor or administrator to include this property in his inventory, and he then becomes bound to account for it in the course of his administration, since the property may be received by him without suit and in such case he is in receipt of it as part of the estate. However, if there is another administration

already covering those assets, as has been said, he should not inventory them, and is not bound to account for them.

In a case in Pennsylvania where there was administration taken in Pennsylvania and New York by the same administrator a resident of Pennsylvania, upon the estate of a resident of Pennsylvania, and there existed a mortgage on land in New Jersey, which came into the hands of the administrator in Pennsylvania, it was held that it was improper for him to carry it to the inventory of the New York property, but he should have scheduled it as part of the Pennsylvania estate.

Reverting again to general executors and administrators, they are required before entering upon the duties of their office to take an oath, usually prescribed by statute. Such an oath is to the effect that the duties will be faithfully and honestly performed and the estate distributed according to law.

The Question of Bond.

Ordinarily only foreign executors are required to furnish bond, but in the case of administrators it is provided by statute in a majority of States that before letters are granted or any duties assumed a bond must be given with sufficient sureties to secure the proper performance of such duties. In Pennsylvania, a non-resident executor may be compelled to give bond, but a resident executor can claim appointment without giving bond. If after his appointment an executor becomes guilty of mismanagement of the estate, or wastes it after his appointment, bond may be required of him to protect those interested in the estate. In Pennsylvania it is expressly provided by statutes that the appointment is void if the bond is not given within the time required by law. If a bond is given which is irregular or insufficient, the effect upon the appointment is the same. Thus it has been held that taking a bond with one surety when two or more are required invalidates the appointment. The amount of the penalty of an executor's or administrator's bond is usually regulated by statute, being as a general rule double the estimated value of the personalty. Many States have made provision by statute that if the testator or all parties interested in the estate expressly so request, the executor or administrator may be exempted from giving a bond or sureties on his bond; but all creditors and guardians of minors should first be notified and given a hearing and the court may subsequently require a bond with sureties, if it thinks such security necessary. Upon

filing the bond, and taking the oath of office, letters of administration will then be granted either testamentary or of administration, as the case may be. In Pennsylvania what are known as short certificates are given by the Register of Wills to the party so qualifying. These certificates are to indicate the power of the person named therein to represent the estate.

The next important duty imposed upon an executor or administrator is to prepare and file an inventory of the decedent's estate, the main features of which are a list of the real and personal estate and appraisal or estimate of the value thereof made by disinterested appraisers.

Under the law of Pennsylvania it is provided that executors and administrators shall, within thirty days from the time administration is granted, make a true and perfect inventory of all goods, chattels and credits of the deceased, as far as they may know or can ascertain them, and to exhibit the same in the office of the Register of Wills. The time after appointment within which an inventory and appraisement should be made and filed is regulated by statutes which vary in minor details in different jurisdictions.

Failure to file an inventory within the time specified is a technical breach of the administration bond, but may be generally cured by filing such inventory when ordered by the Court. But if, on being cited to file an inventory, any delay or backwardness occurs, the courts view such actions with suspicion. If no property belonging to the estate of the deceased comes into the hands or knowledge of the executor or administrator, the fact that he has disposed of it all does not release him from the duty of filing an inventory.

The Pennsylvania act of February 24, 1834, provides that whenever personal property or assets of any kind not contained in the inventory originally made shall afterwards come to the possession or knowledge of the executor or administrator, he shall take an inventory thereof and return the same into the office of the Register of Wills within four months from the time he discovered such assets. All bonds, notes and other evidences of debt, also all other claims and demands for money, or any other personal property owned or held by the decedent at the time of his decease, shall as far as the same may be known to his executors or administrators be included in the inventory made.

Where an executor or administrator fails to file an inventory and appraisement as required by law, upon presentation of a petition setting forth the facts the Register of Wills of the proper

county will issue a citation to such executor or administrator, to show cause why he should not do so.

A testamentary provision that no inventory and appraisement need be filed is usually disregarded by the courts in a majority of jurisdictions, although an executor will not be required to file an inventory except as to the personalty where the will leaves it to his discretion and makes his appraisements final. Even the fact that all personal property of the decedent or its proceeds have been disposed of in the payment of debts does not render an inventory unnecessary, nor is it sufficient to excuse the filing of an inventory that the representative professes to have a large surplus over all debts and offers to deposit security sufficient to pay any debt which may be established. But an inventory may be dispensed with where all the parties in interest waive it and is unnecessary where no assets or estate have come within the representative's possession or charge. An inventory and account may also be dispensed with if not applied for until after so long a period that the lapse of time, in conjunction with other circumstances, affords a reasonable presumption that there were no assets or that the estate has been fully administered, nor is the Court required to order an inventory and account where it appears that the estate was duly settled and distributed among the persons entitled without any proceedings in court.

Upon receiving their appointment, executors and administrators are required by the statutes of most States to advertise this fact, requesting all persons indebted to the estate to make payment and those having claims against the estate to present same. In Pennsylvania such advertisement is required to be published once a week for six consecutive weeks in one newspaper and the legal journal of the county. The importance of this notice relates mainly to the claims of creditors against the estate. Having published this notice, the executor or administrator is relieved from personal liability if he distributes the assets among those who have duly presented their claims, but notice so to do must be given to all. Furthermore, if an executor or administrator who has given public notice of his appointment does not within a limited time from the notice of his appointment receive from creditors demands against the estate which authorize him to declare the estate insolvent, he may without personal liability pay out the estate to the creditors. After the expiration of that time, if the payment is made before he has actual notice of any other claim, and if he does not wholly pay the estate but has not enough left to answer such other claims, he may satisfy that so far as

he can, and shall be discharged from further liability. However, if two or more of such claims are presented, and he has not enough assets to satisfy them, he must declare the estate insolvent. It is obvious from what has just been stated that this notice is intended for the protection of the executor or administrator from personal liability in distributing the estate.

At this point and before proceeding further with the rights and duties of the personal representatives of a decedent, it will be well to comment briefly upon the law governing joint executors and administrators.

Joint Executors and Administrators.

The interest of two or more joint executors or administrators in the estate over which they are appointed is joint and entire, and the executors and administrators are considered as one individual. Each of the executors or administrators is entitled to the possession of all the personal property, and if one has actual possession of any of the personal estate, he is entitled to retain it, as against his co-executor or co-administrator.

This interest between joint personal representatives is of such a nature that no partition can be made among them, for each owns the whole, thereby differing from ordinary joint tenants, who own only a partial interest, although possessed jointly. And since each of the joint executors and administrators owns the whole interest in the personal property, it follows that if either grants his share in the estate to a third person, he grants the whole estate. Likewise if one releases his interest to the other, nothing passes because both owned the whole before. While, however, the interest is different in the above respect from the ordinary interest of joint tenants, yet it is in other respect like that interest. The rule as to survivorship among joint tenants applies to the interests of joint executors and administrators, and if either dies, his interest passes to the survivor or survivors.

Since the executors and administrators are thus considered as one individual, if one of them takes possession of the estate, or any portion thereof, that possession enures to the benefit of all. All contracts which were made with the deceased must be sued or defended by all the executors or administrators, since all of them collectively represent the deceased and not any of them individually. As the executors or administrators are regarded as one person, any one may act alone in regard to the personal estate. The administration of the estate may, therefore, be wholly carried on by one, and he may perform all the acts necessary to such administration. Thus, one of several co-executors

or co-administrators may assign or sell a promissory note payable to the testator. So one may release a debt due to the estate or accept payment of a promissory note and give a valid receipt and discharge therefor. One of several co-executors or co-administrators may settle an account with one who has had dealings with the estate. On the same principle it is held that one of several executors or administrators may assign or release a mortgage. But as an executor or administrator cannot put any new obligation on the estate, but can only bind himself personally, he cannot bind his co-executors or co-administrators by any contract he may make, without ratification on their part. For example, if he borrows money for the estate he alone is responsible and neither the estate nor his co-executors or co-administrators are liable.

The liability of joint executors and administrators is limited to such portion of the estate as has come into their possession, or for acts of negligence or fraud of the co-executor or co-administrator which he knew of and assented to. This liability is extended in case all sign a joint bond, and the liability of each is then for the administration of the whole estate.

An executor or administrator cannot delegate his authority and thus avoid any of the liabilities or escape any of the duties imposed on him by law. He may, when necessary, employ and pay agents of his own, such as professional counsel, collectors, bookkeepers, etc., who respond to him alone for their acts, and for whose acts he as principal must answer.

It is the duty of the personal representative to include in his inventory all property to or claimed by the decedent or his estate which has come to the representative's knowledge, but property held in trust by the decedent need not be inventoried. There has been considerable discussion whether the inventory should include property outside of the State or country where the executor or administrator is appointed. The general rule is to the effect that the inventory should properly include assets in another State, unless they are in a State where administration has already been granted, the plan being to have all the assets of the estate covered by some regular administration.

Appraisement.

In Pennsylvania it is provided by the act of March 15, 1832, that every executor or administrator shall cause a just appraisement to be made of the goods, chattels and credits of the decedent

by two appraisers. The result of the appraisal is only an approximation to the real value and does not bind anybody. In valuing the property the appraisers should take the value as of the time of the appraisal. For instance, bonds and negotiable securities should be appraised at their market value, not at their face or nominal value. The appraisal is noted upon the inventory blank which accompanies the order, and the schedules filled up, and the document when completed is delivered to the executor or administrator, by whom it must be returned to the Orphans' Court for record. In Pennsylvania, the act of April 17, 1869, section 1, provides that where a testator directs any part of his estate to be appraised, appraisers will be appointed by the Orphans' Court upon petition of any person interested; this applies only when the testator has not indicated by whom the appraisal shall be made, and an appraisal made by competent persons, chosen by the executors under a clause in the will providing that an appraisal of the residuary estate should be made by the executors in such manner as might seem best to them, will not be set aside in the absence of any allegation of fraud or lack of good faith.

The bulk of the estate of a decedent which is to be administered generally consists of the ordinary personal property of every-day life. Household furniture, clothing, money, and sometimes bonds, stocks, notes, carriages and other forms of personal property will be found to form a large part of it. In farming communities, the farm tools and implements; in business centers, the stock and merchandise, will enter into the estate. Few questions arise as to the fact of these kinds of property being assets of the estate. There are, however, two points to be noted: First, that some chattels may be so affixed to realty as to become part of it, and then do not form part of the personal estate; second, that only property which was owned by the deceased at the time of his death forms his estate.

When personal property is affixed to realty it is called a fixture. Technically speaking, fixtures are those personal chattels which have been annexed to land, and which may afterwards be severed and removed by the party who has annexed them, against the will of the owner of the land. But the term "fixtures" is commonly used to include those chattels which become part of the realty, and cannot be removed, as well as those which may be removed. The general rule is that whatever is affixed to the realty is thereby made part of it, and partakes of its incidents and properties. The effect of this rule on chattels affixed to the

realty, as regards the right of the executor or administrator and heir or devisee, and the remainderman or reversioner, we will now proceed to examine.

A chattel, in order to become a part of the realty, must be in some way actually affixed to the land or house or other part of the realty. It is not sufficient that it be merely laid upon the ground or brought into contact with it. Thus fence rails laid in piles upon the ground are personal property, while a fence attached to the land by posts, stakes or otherwise, is part of the realty. For the same reason it has been held that where a tenant built a barn, and put it upon blocks of wood resting on the ground and not inserted in the ground or in any way fastened to it, the barn remained personal property and the tenant might remove it. The rule may be stated as follows: If the chattel is so affixed to the realty that it cannot be removed therefrom without serious injury thereto it becomes and is to be regarded as part of the realty.

By far the greater number of cases which arise on this point are those in which the chattel in question is affixed in some manner to the realty or to some portion thereof, but not in such a manner that great damage would be done to the realty if the chattel were removed. In such cases the intention of the party affixing it, as shown by the various circumstances of the case, viz., the manner of affixing it, the purpose for which the chattel is to be used, the purpose for which the building is used, and the like, governs the decision in each case. If the chattel is affixed to the realty merely for the better use of the chattel, as, for instance, when a carpet is attached to a floor by tacks, it remains personalty. But chattels which are affixed to the realty for the better and more convenient use of the building for the purpose to which it is specially adapted are considered part of the realty. Thus, when a building is built for and specially adapted to use as a mill, the water wheel, millstones and running gear are part of the realty.

In considering the relation of the person affixing the chattel to the realty, it is important to notice the different rules which the courts have laid down as to the rights of the executor or administrator of the owner in fee, the owner for life and the tenant for years. The law looks with strictness upon the right of the executor or administrator of the owner of land in fee, as against the heir of such owner, for the principle of the law is that the inheritance should be allowed to descend to the heir unimpaired, whereas, as between the executors or administrators

of a tenant for years and the owner of the land in fee, the law looks with somewhat more favor on the rights of the executors or administrators. The reason for the difference is that the tenant for years, knowing his interest in the estate to be limited, is not presumed to have intended to enrich the estate permanently and therefore the law would require such an intention to be shown more clearly than in case of the heir. An exception to the strictness with which the law regards the executor or administrator, as against the heir, exists in case of fixtures put up in a dwelling house for ornament or convenience. These may be removed by the executor or administrator if it can be done without substantial injury to the realty.

As between the executor or administrator and the devisee, the rule is even more strict against the executor than as between him and the heir, since it is presumed that the testator intended to grant the full enjoyment of the land devised, and therefore, if there is any question, the presumption is in favor of the devisee. As between the executor or administrator of the tenant for life and a remainderman or reversioner, the rule is more relaxed in favor of the executor or administrator and particularly in regard to trade fixtures, which probably would go to the executor or administrator unless so affixed to the freehold that substantial injury would be done by removing them.

Mention has already been made that only those chattels are assets of the estate of a decedent in which he had ownership at the time of his death. The money due on an insurance policy on the life of the deceased is an asset of the estate, if this policy was payable to the deceased or his representatives, but if payable to others it is not. A policy payable to the deceased, "his executors, administrators or assigns," for the benefit of others, is not, strictly speaking, assets, but the executor holds same in trust for the beneficiaries. A policy on another's life is assets, if payable to the deceased.

Dividends on stock generally belong to the person who owns the stock when the dividends are declared, and not to the executor or administrator of a prior holder of the stock while the dividend was being earned. However, if one has a limited interest, as where one has a life interest in stock of a manufacturing company, a dividend wholly earned before his death, but not declared till after his death, will go to his executor or administrator, as being part of his life interest, and not to the subsequent owner of the stock. There is some diversity of opinion on this point. Interest on money goes to the executor or administrator up to

the time when the decedent died, even though it is payable half-yearly or at other definite times. Interests in patents and copyrights vest in the executor or administrator, and the executor or administrator may make application for a patent covering an invention of the decedent. The same principle applies to a trade secret or process which one has discovered and kept secret, whether patentable or not, if the person about to use it will by so doing violate any contract or be guilty of a breach of good faith. The contract right in such case survives to the executor or administrator, and he may bring a bill for an injunction. Likewise a pension from the Government payable to the widow, who dies before it is paid, should be paid to her executor or administrator, and not to the children.

As incidental to the duty of the personal representatives to collect the assets of a decedent's estate, the executor or administrator has the right to compromise any demand of the decedent, provided he acts honestly and within the range of a reasonable discretion for the true interests of the estate. The duty of the personal representative to collect debts due the estate of his decedent is not changed by the fact that he is a debtor. He must, if solvent or able to pay, pay the debt and account for the amount thereof as assets. He is not debarred, however, from showing that the claim against him is unfounded or unjust or has been paid, and he may also return the debt as uncollectible when the facts warrant this to be done.

Assets of the Estate.

It is a primary duty of the executor or administrator to collect the assets of the estate of the deceased for the benefit both of the creditors of the estate and the next of kin or legatees. In general he has the right to and should take into his possession or custody all personal chattels even though specifically bequeathed, and proceed to collect all debts or claims due the estate. Whenever assets come into the possession or knowledge of the personal representatives, they become liable to account for the same satisfactorily or else stand chargeable with their full value. So far as land and other real property of the deceased is concerned, the personal representatives have no interest as a general rule, except so far as it may be given by statute, or in case of an executor, by the will of the deceased. The executor or administrator may with the consent of the heirs occupy the land, but then becomes liable to them for the rents and profits, but not as assets which creditors can reach.

Another interest in the real estate of a decedent which is conferred by statute upon the executor or administrator is the power to sell the same for the payment of debts. This power gives the executor or administrator no estate in the land, and is a mere power only to be exercised by leave of the Court. An executor or administrator sometimes takes land on execution for debts due the estate. In such a case the land belongs to the personal estate and is to be accounted for as such. The executor or administrator holds the legal title in such lands in trust for creditors, distributees and legatees, and may, therefore, maintain actions for trespass on the land, or may recover possession of it until distribution and partition are made.

Profits realized from lands which have been bought with partnership funds, and are held for partnership purposes, are considered to be personal estate, until the dissolution of the partnership, and go as such to the executor or administrator; but the land upon such dissolution resumes its character of real estate, and descends to the heirs. Rents which accrue after the death of the lessor (decedent) go to the heir. Rent which accrues before the death of decedent goes to the administrator or executor and the right to sue for it is in the personal representatives.

Safe-Keeping of Estate Funds.

The executor or administrator, for the purpose of safely keeping the funds of the estate during administration, should deposit the same in a bank, but the deposit should properly be made with a designation of his trust or fiduciary capacity. If the funds are so deposited, and due care is used in selecting the depository, the executor or administrator is not responsible for a loss resulting from the subsequent failure of the bank, the test being whether he has exercised such prudence as men of average intelligence ordinarily exercise in their own affairs. For example, in a recent case a trust company was appointed administrator, and as such it became liable to deposit the funds of an estate in a bank. It was held guilty of negligence in depositing them in an insolvent bank, and therefore liable for loss resulting therefrom, where its president had actual knowledge at the time of the insolvent condition of the bank of deposit, and its officers whose duty it was to look after deposits of trust accounts had heard rumors sufficient to put them on inquiry, which if made would have revealed to them the true condition of the bank. And in view of these facts, the fact that the clerk of the trust company

having immediate charge of the deposits acted in good faith, believing the bank to be solvent, did not exonerate the company, nor was the trust company authorized to rely on the general reputation of the bank, where its president was also president of the bank and thus had the means at hand, coupled with the duty, to acquaint himself with its condition. This rule, of course, applies with equal force to individuals.

The general rule is that neither an executor nor an administrator is justified in placing or leaving assets in trade, for this is regarded as a hazardous use to permit of trust money. It is a great breach of trust for an executor or administrator to engage in business with the funds of the estate, and consequently the law charges him with all the losses thereby incurred, without, on the other hand, allowing him to receive the benefit of any profits that he may make, the rule being that the persons beneficially interested in the estate may either hold the personal representative liable for the amount so used, with interest, or, at their election, take all the profits which the representative has made by such unauthorized use of the funds of the estate.

As an apparent exception to the above-stated rule, the personal representative may continue the business of the decedent so far as is necessary for the purpose of winding up the same and converting the assets into money, or carrying out existing contracts of decedent. A testator frequently authorizes his executor to carry on his business, usually providing the conditions under which this shall be done. Now, it has been decided by the courts that where the personal representative is authorized to carry on the business of the decedent the debts incurred in so doing are chargeable against the estate and not against the personal representative individually.

Carrying on a Business of Decedent.

In cases where an executor is authorized to carry on the decedent's business after his death, only such assets of the estate as are invested in the business at the time of the decedent's death can be considered as trade assets, and, in the absence of some clear authority in the will, the other property of the estate cannot be subjected to the risks of trade or be made liable for debts contracted by the representative in carrying on the business. A claim that an executor, carrying on the business of his testator under the will, made fraudulent representations as to the value of the estate in order to obtain credit, gives no right of action

against the estate, but only against the executor personally. The Supreme Court of Pennsylvania has ruled that where an executor is given "full power" to conduct the business in which testator was engaged, he may carry on all testator's business interests and in doing so is not limited to capital invested in the business.

Unless the creditors existing at the death of the decedent in some way consent to the carrying on of the business by the executor, they have the right to insist that the estate, as it existed at decedent's death, shall be used for the payment of their debts and the expenses of administration to the exclusion of debts subsequently created by the executors. But if the business was carried on by the executor with the consent of the original creditors, the creditors of the business must either share *pro rata* with the other creditors in the whole estate (which is doubtless the correct rule) or be first paid out of the portion of the estate used in the business.

The personal representative of a decedent has, as a rule, no more right to continue in a business in which the decedent was a partner than he has to continue a business in which the decedent was sole proprietor. The executor of a deceased co-partner may continue the business where the will directs him to do so, and the liability of a deceased co-partner as well as his interest in the profits of the concern may by the co-partnership contract be continued beyond his death, although in the absence of such a stipulation the death of one of the partners would dissolve the firm, even though the co-partnership was expressed to be for a term of years. With such a contract, the effect must naturally be to bind the estate of the deceased partner in the hands of his executor or administrator without compelling such representative to become a partner personally. This is one of the objections to a co-partnership arrangement, which is overcome by incorporating.

A settlement of partnership affairs made with the surviving partners by the personal representative of a deceased partner is binding on the latter's estate, its creditors and beneficiaries, except in cases of fraud or mistake, and for only the share thus received is the personal representative liable to account.

In making investments of the funds of the estates, the personal representative acts as trustee rather than as executor or administrator, and his duties and liabilities in respect to such investments are governed by the same rules as apply to other trustees. If the will contains directions as to the investments to be made, these must be followed. Ordinarily investments are restricted to real estate, Government and municipal bonds, and if

the executor or administrator has any doubt as to the wisdom of any investment, it is the part of wisdom for him to obtain the sanction of the Court before making the investment, in order to avoid any possible effort being made to hold him personally responsible. The personal representative of an estate is liable for all losses sustained by virtue of unauthorized or improper investments. An executor or administrator who fails to invest or deposit funds as required is chargeable with interest thereon.

It is a fundamental principle of the law on this subject that an executor or administrator will not be allowed to acquire individual interests inconsistent with the representative capacity he sustains for the benefit of the estate, nor to make a personal profit out of his dealings with the property of the estate. Transactions in which the representative as an individual deals with himself in his representative capacity are always regarded with suspicion and will be set aside if inequitable. Hence, while his general right to dispose of assets is conceded, an executor or administrator should not purchase or speculate with property of the estate for his individual benefit, divert the funds of the estate into business or investments for his own private gain, buy out for himself his decedent's share in a partnership or sell his own property to the estate.

The representative's sale of assets or other transactions made for other purposes than the due discharge of his duty as executor or administrator will not be sustained against the interests of the estate, where the person with whom he dealt had notice of his bad faith or breach of trust, and in such case the transaction may be set aside and restitution enforced. However, a third person who in dealing with such representative acted in good faith, and has paid a consideration, will be protected in the transaction.

Executors and administrators are not insurers, nor will they be chargeable with the loss or depreciation of assets where they have acted in good faith in the care and management of the estate. The estate of a decedent is not liable for the fraud, false representations or misconduct of an executor or administrator, but the personal representative who practices such fraud will be answerable personally therefor to the injured person.

Sales of Personal Property.

The personal estate of a decedent vests in the executor or administrator, as we have already pointed out. The executor or administrator is charged with the duty of paying the debts of

the intestate, and to accomplish this object he has the power to sell the personal estate at any time, provided the sale is *bona fide* and without fraud. In some States an order of Court is required to authorize a sale. The power to sell personal property includes the power to sell chattel interests in land, such as leases for terms of years, mortgages, etc. As auxiliary to the power of sale of personal property owned by the executor or administrator, his power is extended to endorsing bills of exchange or promissory notes of the deceased, with the same effect as if the endorsement had been made by the deceased himself.

A mortgage before foreclosure, being considered personal property of the mortgagee, may be sold by his executor or administrator and assigned by him, without an order of Court except as this may be required by statute. After foreclosure the mortgage interest becomes real property and cannot be sold without the sanction of the Court. The power of an executor or administrator to dispose of the personal property of the decedent is held by high authority to include the power to mortgage the assets in order to raise money for the purposes of administration. In Pennsylvania a chattel mortgage is not recognized as possessing any validity. The power of the executor or administrator to sell personal property includes the power to pledge the assets to raise money, and the pledgee may sell if the pledged property is not redeemed.

Interests in Real Estate.

The personal representatives of a decedent cannot, by virtue of their office, occupy and lease land or receive the rents and profits thereof accruing after the death of decedent. All rights and profits connected with the realty belong to the heirs or devisees. The powers of an executor or administrator relating to land are limited to the application for and proper execution of an order of sale when this is necessary to pay debts. When an executor or administrator ascertains that the personalty is insufficient to pay the debts it is his duty to present a petition for leave to sell real estate, or if such power is conferred by the will, he should exercise it for the benefit of creditors. The circumstances under which leave will be granted to sell real estate are so numerous and involve such technicalities that it would not be in conformity with the spirit of these articles to discuss same in detail. Whenever it becomes necessary for an executor or administrator to obtain leave of Court to sell real estate, it is

imperative that an attorney be employed, these articles being limited to an analysis of only such general principles of law as would be of interest and value to the average business layman, that he may be guided without the services of an attorney.

The personal representative of a decedent has at common law no title or right to the rents and profits of the real estate of his decedent accruing after the latter's death, but possession and control of real estate such as will carry the right to rents and profits may be given to the executor or administrator by the will, and statutes frequently give the representative the right, under appropriate circumstances, to receive the rents and profits, either for the purpose of using them for payment of the debts or for other proper purposes connected with the administration. The representative who has collected rents may be protected where, instead of paying the same over to the heirs or other distributees, he has under prudent and reasonable circumstances applied the same beneficially for the premises, as in keeping down mortgage interest and preventing foreclosure at a sacrifice, or for keeping the buildings in proper repair. The Supreme Court of Pennsylvania has decided that an administrator has no authority to apply rents collected to taxes and arrears of ground rent accruing subsequent to the death of the decedent. The Court has also refused to call a widow who was administratrix to account for rents and profits expended in the support of infant children of the deceased.

As a general rule of law, an executor or administrator who has taken possession or control of the real estate of his decedent must account for the rents and profits thereof. He is not responsible for rents for a time when the real estate was not in his possession or control unless he has been guilty of some lack of good faith which has resulted in a loss to those entitled to the rents.

The common law rule that the personal property is the primary fund for payment of the decedent's personal debts, to the exemption of the realty, has been extended so far as to allow the heir or devisee to call upon the executor or administrator to exonerate the realty from a debt constituting a lien thereon, unless the testator has expressed his intention to the contrary in plain terms. However, the rule relates only to personal debts of the decedent, and if the decedent acquired land already subject to a mortgage the representative cannot be called upon to discharge it unless the decedent made the debt his own or directed by will that his personal estate should discharge the lien.

In view of the fact that a lease of lands is a chattel interest going to the personal representative as assets, it is the duty of the personal representative to perform the contract, and he is liable for a breach of it, while on the other hand he may maintain ejectment with relation to the leased lands.

Priority of Debts.

We have noted the fact that a personal representative of a decedent must, upon qualifying as such, make an inventory and appraisement of the assets, advertise his appointment and apply the assets to the payment of decedent's debts, after which distribution must be made in accordance with the will or the intestate laws, as the case may be. It is most important to understand the order in which the debts of a decedent must be paid by the executor or administrator, which we will next proceed to outline.

The order of priority of payment of debts is settled by statute in a majority of States, to which reference must be made by the executor or administrator to determine upon his proper course of action.

In Pennsylvania it is provided by statute that all debts owing by any person within this State at the time of his death shall be paid by his executors or administrators, so far as they have assets, in the following order, viz.: (1) Funeral expenses, medicine furnished and medical attendance given during the last illness of the decedent, and servants' wages not exceeding one year; (2) rents not exceeding one year; and (3) all other debts, without regard to the quality of the same, except debts due to the Commonwealth, which shall be last paid. By the same act (act of February 24, 1834) no executor or administrator is compelled to pay any debt of the decedent, except such as are by law preferred in the order of payment to rents, until one year be fully elapsed from the granting of the administration of the estate.

Widow's Exemption.

A portion of the husband's estate is given by statute in most States for the immediate support of the widow and children after the husband's death. This portion is called the widow's allowance or exemption, and generally consists of a certain quantity of provisions and a certain amount of property up to a limited value. This allowance either takes precedence of all debts and charges upon the estate, or ranks immediately after the expenses

of last illness and funeral. In Pennsylvania, under the act of April 14, 1851, and supplements, it is provided substantially that the widow or the children of any decedent dying within this State may retain either real or personal property belonging to the estate to the value of \$300. Upon presentation of such a claim by the widow or children of a decedent it becomes the duty of the executor or administrator to have the property to be exempt appraised. The widow must present her claim within a reasonable time and the appraisement must be made as soon as possible. The Supreme Court of this State has held that a widow is entitled to \$300 out of the proceeds of the sale of her deceased husband's real estate in preference to a judgment creditor in whose favor he had waived the benefit of the exemption law.

It is evident that the amount which should properly be allowed by the Court for the funeral expenses of the deceased must vary greatly with the condition of his estate, for expenses which might be proper and suitable if the estate is solvent would clearly be unsuitable if the estate was insolvent, as they would diminish the fund from which the payment of debts is to be made. Necessary items of expense are coffin, shroud, hearse and undertaker's fees, and these would be allowed even if the estate were insolvent. If the deceased died away from home the expense of transportation to his home and of a person to attend such transportation has been held a necessary one. Expenses of entertaining guests at a funeral have been held not to be necessary as part of the funeral expenses in case of an insolvent estate. There is some conflict of authority as to whether the expense of a gravestone is necessary so as to give it priority as part of the funeral expenses. In Pennsylvania it has been decided that the expense of a gravestone was allowable, even against creditors.

If the executor or administrator orders the funeral and interment, or if he ratifies or adopts the acts of another he is personally liable for these expenses. If he is compelled to pay these expenses he must look to the estate for his remuneration. He would have, in such case, a preferred claim upon the assets of the estate.

With reference to expenses incident to last illness, whether the expenses claimed were incurred during the last illness of the deceased is a question of fact to be decided by a jury in case of dispute. Any illness terminating in death may be regarded as a last illness in this connection. All sums paid for the expenses of the last illness are of equal degree and should be paid ratably in

case of a deficiency of assets. In New Jersey it has been held that the physician's bill should be paid before the funeral expenses.

A claim for services rendered to the decedent may be allowed against his estate, whether such services were rendered upon an express contract for a fixed payment, or without any such contract, but with the expectation of reasonable compensation therefor. Failure to demand payment during the decedent's lifetime will not necessarily defeat a claim against his estate for valuable services performed at his request. The courts regard with suspicion and disfavor claims brought against a decedent's estate for personal services rendered by relatives, especially where the latter are members of his immediate family or household, as the presumption is that such persons would render such services gratuitously. Consequently claims against the estate of a decedent made by near relatives for personal services require stronger proof to establish them than ordinary claims made by strangers.

Lien of Decedent's Debts.

In Pennsylvania it is provided by statute that no debts of a decedent, except they be secured by mortgage or judgment entered or revived within five years prior to the death of decedent, shall remain a lien on the real estate of such decedent longer than two years after the decease of such debtor, unless an action for the recovery thereof be commenced against such decedent, his heirs, executors or administrators within the period of two years after his death, and duly prosecuted to judgment.

The executor or administrator is neither bound nor allowed to pay any claims which are not valid, legal debts of the estate. Claims barred by the Statute of Limitations should not be recognized by the executor or administrator. All the simple contract debts of the deceased generally rank alike, and in case of insolvency each takes the same proportion as the others. If the executor or administrator exhausts the estate by paying the preferred debts, this prevents the common debts from recovering anything, either against the estate or the executor or administrator personally, and the same is true of a lower class of preferred debts if the estate is exhausted in paying a higher class of debts.

The legitimate expenses of administration are to be met out of the assets of the estate, but the proper mode of doing this is

for the representative to make the necessary disbursements, for which he will be allowed credit in his accounts rather than by allowing such expenses as a direct charge against the estate, as the expenses of administration are not debts of the decedent.

The costs of administration include all expenditures which an executor or administrator is obliged to pay out for the due administration of the estate, such as expenses of probating the will and securing a decree of appointment, costs of suit brought by or against him in defense of the estate, costs of proceedings proper to the settlement of the estate in the Orphans' Court, and the like. Costs of administration are generally preferred over the payment of other debts, second only to the funeral expenses and costs of last illness.

Presentation of Claims.

The procedure for the presentation of claims against the estate and actions to enforce payment thereof vary so widely in the different States that the statutes of each State furnish the only safe guide in each instance. There are several important features which are common to all the States, which we will briefly consider.

Claims should be presented to the executor or administrator immediately upon receiving notice of their appointment. In making the statement or the presentation of the claim to the executor or administrator, it is not generally necessary to follow any formal method of statement; any statement which gives the amount and nature of the claim with sufficient precision to prevent a subsequent claim for the same debt will be enough. Presentation to one of several executors or administrators is sufficient. If the executor's or administrator's notice requiring claims to be presented specifies the office of a certain attorney as the place for presenting them, it is sufficient if a statement of the claim in writing is left at the attorney's office.

According to the weight of authority, knowledge on the part of an executor or administrator of the existence of a debt or claim against the estate is not sufficient to dispense with the necessity of presentation. A debt which is not due at the time of proving claims, but is payable absolutely at a definite time in the future, may be proved as a claim against the estate and funds retained to meet it. It is a general rule that all claims against the deceased should be presented for allowance, and as used in the statutes under discussion the word "claims" is held to include

such debts or demands as existed against the decedent in his lifetime and might have been enforced against him by actions at law.

According to the weight of authority, a debtor whose claim is secured by mortgage, pledge or any specific lien need not present his claim for allowance in order to preserve his right to subject the property covered by the lien to the satisfaction of his claim, for the reason that such claims cannot in any just sense be considered claims against the estate, but the right to subject specific property to the claim arises from the contract of the debtor, whereby he has during life set aside certain property for its payment, and such property does not, except in so far as its value may exceed the debt, belong to the estate, and the instrument being of record or the property being in the possession of the creditor is notice to all the world of the contract. But where a mortgagee, pledgee or other secured creditor seeks to obtain payment either in full or of a deficiency out of the general assets of the estate and thus to enforce his claim against property not covered by his lien or held by him as security, his claim stands on the same footing with the claims of other creditors and must be presented for allowance. The security of a mortgagee, pledgee or other secured creditor is not affected by his presentation and securing the allowance of his claim.

It is very generally provided by statute that claims presented or filed against a decedent's estate shall be verified by an affidavit as to their correctness. In New Jersey it was formerly held that no recognition of a claim by the personal representative or by the Probate Court could dispense with the requirement that claims be presented under oath and within the statutory period; it has recently been provided by statute in that State that if a personal representative in good faith pays a claim not presented under oath, and the claim is proved to have been a just one, he shall have allowance for the payment if there be sufficient assets to pay the debts of equal degrees in full, and that if the assets are not sufficient, the representative shall be allowed for the *pro rata* amount which the creditor would have been entitled to receive if the claim had been presented duly verified.

A creditor who has not presented his claim within the regular statutory period, although precluded from sharing in the inventoried assets of the estate, is entitled to participate in subsequently discovered assets not inventoried or accounted for by the personal representatives, provided, however, his claim is proved and allowed for this purpose. The creditor, if successful

in establishing his claim, is entitled to a special judgment to be satisfied out of the uninventoried assets subsequently discovered.

Disputed Claims.

The personal representative of a decedent may contest any claim which in his opinion ought not to be allowed against the estate, and any person having an interest in the estate adverse to the allowance of the claim may contest it. Heirs and distributees may contest the allowance of the claims of creditors, or of the representative; and one creditor may contest the claims of other creditors provided the assets are insufficient to pay the claims of all. An objection cannot be made by a person who, although interested in the estate, could not be benefited by a disallowance of the claim.

It is the duty of the representative to contest all claims presented against the estate which he believes are unfounded or unjust, and which are not presented and authenticated according to the requirements of the statute. But the propriety of contesting particular claims must frequently be left largely to the representative's discretion and no presumption of bad faith or misconduct will be made against him. Objections to a claim may be based on a denial of its justice or validity, or may rest on the ground that the claim is barred, or that the claimant has not complied with the statutory requirements as to its presentation and authentication. But it is not a valid objection to the claim of a creditor that a similar demand has been presented against another estate, or to the claim of a representative that he has not filed his bond.

Insolvent Estates.

In pursuance of the general plan which is adopted in a majority of the States, of gathering in all claims against an estate, and paying them all at the same time, so far as may be, and in the same proportion, if the assets are not enough for all, there are enacted in most States statutes which exempt an executor or administrator from liability to suit for a given time in order that he may have an opportunity to collect the claims against the estate, and get an idea of whether the estate is solvent or not. The executor or administrator, having thus collected the assets and the claims against the estate, may decide whether or not the estate is insolvent. As soon as the debts which the executor or administrator recognizes as valid exceed the assets which he has

in possession or control, the estate is insolvent, and must be treated as such. Often this question cannot be determined until the time for filing the claim has expired, for although the assets may seem sufficient up to the time, yet at the last moment claims may be filed which will render the estate insolvent. The question of whether or not an estate is insolvent when there are assets in several jurisdictions and ancillary administrations is one of some difficulty. It has been decided that the safest rule is that each jurisdiction should decide the question upon the debts proved before it, and the assets in its hands. In deciding whether or not the estate is insolvent only valid claims can be considered. Thus debts barred by the Statute of Limitations must be rejected.

If the claims of partnership creditors, together with those of the separate creditors, make up a sum greater than the total assets of an estate, including the share of the partnership asset which belong to the estate, each class of claims must be primarily remitted to its own class for payment, and can come upon the other only after the latter debts have been satisfied. *This rule arises from the fact that the separate creditors of the deceased have no claims upon the assets of the estate until all the firm debts are paid, since the only assets of the estate of the deceased arising from the partnership funds are the surplus of such funds over partnership debts. And conversely, the partnership debts are to be satisfied out of partnership assets, and can only come upon the separate estate after the separate creditors have been satisfied in accordance with the established bankruptcy laws. Thus in settling an insolvent estate of a deceased partner, if both individual and co-partnership claims are proved against the estate, two lists of claims are made, and the partnership estate is distributed among the partnership creditors and the separate estate among the separate creditors.

If the deceased partner owed the firm, and his estate is insolvent, as well as the surviving partner, the estate is liable to make good the amount which the deceased partner equitably owed the living partner as an individual. This is one-half (if the shares of each partner in the partnership are equal) of what he owed the firm; that is, the living partner comes in as an individual creditor of the estate. To this extent only can the surviving partner or his creditors reach the individual assets of the estate. When, however, there is no joint or partnership estate at the death of the partner, and there is no solvent partner, it is held that the firm creditors may come in equally with the separate creditors against the separate estate.

A promissory note given by a personal representative for a debt of his decedent is neither a payment nor an extinguishment of such debt, unless it is shown that the parties intended that it should operate as such. A personal representative has authority to assign bills and notes due to the decedent in satisfaction of debts due by him, but he has no power by assignment or otherwise to appropriate them to the payment of the debt of one creditor to the exclusion of others of equal or higher rank. If a creditor of an estate accepts notes and obligations in favor of an estate as collateral security to collect and apply to his debt, and fails to collect or to show good reason for his failure, he will be charged with the amount of such notes and obligations, and if this amount is equal to his claim against the estate, such claim is extinguished.

Any debt or demand which constitutes a legal set-off for or against a party in his lifetime, if still subsisting at the time of his death, will constitute a good set-off for or against his personal representative, and a personal representative has no right to pay a debt due by the estate which he represents to a person who is himself indebted to the estate, without first having set off the debt due to the estate against that due by the estate.

Filing Accounts.

It is only possible to make a few general observations of this important part of an executor's or an administrator's duty, this subdivision of the general subject under discussion being entirely too comprehensive to treat in detail. An executor or administrator should always keep separate entries of all moneys received and paid entirely distinct from his private account. He should charge himself with the inventory, with any excess of sales or collections above the appraisement, and with all receipts. He should credit himself with all disbursements, he should keep a separate bank account, and on no excuse mingle one dollar of the trust funds with his individual money. He should not borrow or use any portion of the assets, nor lend same to relatives, partners or friends. He should be careful to keep large sums of money at interest, but always so that there may be no loss. He should, of course, take receipts for all payments. Under the law of Pennsylvania an account must be filed in Court within one year from the time the personal representative qualified, and shortly before the year expires, accounts should be prepared and filed and notice thereof sent to all parties in interest. The account should not contain items of distribution, and rents should

be excluded from accounts of personalty. The account of principal should be stated by itself and the income account should be separate in all cases where it is necessary. Accounts of the proceeds of sale of real estate must also be separate from the administration account. Dividends upon railroad and bank stock declared since the testator's death belong to the income account.

In Pennsylvania the following judicial directions may be used as a guide in preparing an account: "The correct form is to charge the accountant (executor or administrator) with the amount of the inventory and appraisement of personal property, and all money received since filing the same, from debts due decedent, not inventoried, together with any excess over the appraised value realized by a sale of the personal property or any portion thereof, and any proper surcharges, either admitted or duly proved. Credit is then to be allowed for preferred debts, expenses of administration, allowance to the widow or children, if claimed, loss upon appraisement by sale, and debts of decedent, if undisputed and estate solvent. The true balance for distribution will thus appear."

When the account is prepared it is filed and advertised and then comes up to be audited before the Court. If any party in interest has any objection to the allowance or disallowance of any claim, he should appear at the audit and enter a contest. A day is then fixed by the Court when the contested claim will be passed upon. The account, if in proper form, and there being no objections, or if so the same having been decided, is first approved "*nisi*" and three weeks thereafter, if no further claims or objections are presented against the account, the same is confirmed by the Court absolutely, after which distribution of the estate will be made either in accordance with the terms of a will or the intestate laws of the State, as the case may be.

It is the duty of a personal representative, upon the settlement of his decedent's estate, and after payment of debts, to make distribution of the decedent's property, in the manner directed by the will, as in the payment of legacies, or in case of intestacy or as to property not disposed of by the will, in the manner prescribed by statute, upon an order of the Court. It is no part of his duty to partition or convey among heirs or devisees the real estate of his decedent, or to pay legacies charged upon the land unless empowered by the will to do so. The power of making distribution cannot be delegated by the personal representatives to another. After an order of distribution, it is the duty of the personal representative to hold the funds in his hands

subject to the order of the Court, and to pay them to such parties as the Court may direct; further than this he has no standing in Court or before an auditor respecting the distribution of the funds in his hands.

In cases where the decedent left a will, the executor, after he has paid all the debts of the estate which have been duly presented to him within the time limited by law, and allowed by him or by the Court as valid debts of the estate, must next pay the various legacies which are given by the testator in his will.

The rule that legacies shall only be satisfied and paid after all debts have been paid is one of obvious justice and is recognized in all States. The general subject of the construction of the terms of legacies, the estate given by them, and like questions, belong more properly to the law of wills which has previously been considered, and in the present connection we will confine our inquiry to the several rules which affect the payment of legacies by an executor.

It was long the established rule of Courts of equity that when a debtor decedent bequeathed to his creditor a legacy equal to or exceeding the amount of the debt, this bequest should be presumed, in the absence of any contrary intention expressed in or inferable from the will, to be meant by the testator as a payment and satisfaction of the debt. However, this rule has been regarded with disfavor in the recent cases where from any circumstance in the will it might be inferred that the testator had a different intention. So little has this rule been favored by the courts that in one of the more recent cases the Court said that if nothing was said on the subject in the will the modern rule of construction would be that a bequest is to be regarded as a bounty and not as the payment of a debt. Slight circumstances in a will are regarded as showing an intent in this regard. Thus, where the testator has left a legacy of less amount than the debt or of a different nature, or not equally beneficial in some particular, it is to be inferred that he did not intend the legacy to operate as payment of the debt. So where the debt was not contracted until after the making of the will it is considered evident that the testator could not have had any intention to satisfy the debt when he made the legacy. The legacy of a specific chattel, however great its value, is not considered as the satisfaction of a debt unless it is so stated expressly in the will. Regarding the converse of this rule, the effect of a legacy bequeathed to a debtor instead of a creditor of a testator, no presumption of a release or extinguishment of the debt exists, but such intention must be

clearly expressed. If a testator does expressly release a debtor from his debt, this release only takes effect subject to the payment of the testator's debts.

There is also in many States a statutory provision by which an executor when paying a legacy may require from the legatee a bond to refund the amount in case subsequent debts appear which are not barred and must be paid. This bond protects the executor in making the payment, and if he pays over the legacy without taking such a bond he is liable to a creditor for the amount of the legacy if the payment was made before the time had elapsed which barred the claim, or if for any reason the claim is not barred by non-presentation or negligence in suit. But the fact that he does not take a refunding bond does not invalidate the title of the legatee to the amount paid him.

At law a legacy, whether specific or general, does not vest in the legatee so as to be subject to his death or to be enforceable by him until it is assented to by the personal representative or at least until it may be seen with reasonable certainty that it will not be needed to pay claims of a higher rank, unless the legacy is charged on the land. In equity, however, the executor is considered as a trustee and may be compelled to give his consent, if he refuses it without just cause. The representative's assent may not be in writing, but may be expressed or implied and may be either shown by direct proof or inferred from circumstances consistent with the intent to render to the legatee or devisee the legal title and control, as where a considerable length of time has elapsed or where the legatee has been in possession for some time with the consent of the representative.

Order of Payment.

If the assets or the estate are not sufficient to pay all the legacies, the order of payment as established by courts of equity is as follows: Specific legacies and devises are to be paid in preference to general legacies and devises, and in the absence of any provisions in the will all the general legacies and devises must abate equally their proportion of the whole amount bequeathed; and annuities, if not payable from any particular funds, stand on the same footing as general legacies.

This rule as to the abatement of legacies is subject to any expressed intention of the testator in his will, directing the manner or the order of priority in which the various legacies shall abate in case of a deficiency of assets. For instance,

a testator may give one general legatee a priority over others. The rule as to abatement is also subject to the further exception that where a legacy is given to one in satisfaction or lieu of some valuable right (for example, where a legacy is in lieu of dower or curtesy) the legatee is deemed a purchaser, and his legacy will not abate until those of beneficiaries of the same class are exhausted. If the assets generally bequeathed are not sufficient to pay all the debts, all the specific legatees must abate their legacies equally, as debts have the prior claim upon the whole estate over all voluntary dispositions. This is upon the theory of law that a man must be just before he is generous.

In a majority of the States the time when legacies may be sued for, and are therefore absolutely payable, is fixed by statute, so that while a legacy may be paid before that time by an executor at his peril, yet he cannot be compelled to pay before that time. In case of a residuary legacy it cannot be known whether the legacy will be valid until it is known whether the debts and other legacies will exhaust the assets. The right of a residuary legatee to the payment of his legacy being so dependent, he cannot bring suit for the payment thereof without showing such facts as justify the payment either of the whole or a part of the residue to him; that is, that the executor has assets not needed to pay debts or the other legacies, and that the payment will not be injurious to the estate. These facts may not arise until long after the end of the one-year time limit for the payment of legacies.

When an executor is also legatee or distributee, no formal act is necessary to vest title to the legacy in him as an individual, and any act on his part showing an intention to retain assets in payment thereof is sufficient. But he cannot without an order of Court or a settlement or agreement with his co-legatee or co-distributee retain his legacy or share from the assets of the estate to the exclusion of or in preference to other legatees or creditors, as by applying it to debts due by him to the estate. He cannot transfer to himself as legatee property belonging to the estate before he has settled his administration account and paid the debts and prior legacies due from the estate.

Likewise an executor who is also residuary legatee acquires full title to the residuary assets only when all debts, charges and legacies are paid.

Advances and disbursements made by the representative for the benefit of legatees are to be reimbursed from their

respective shares in the estate; and they should be specially adjusted by the personal representative aside from his ordinary administration accounts, by way of an offset to the amount due from the estate in his hands to the legatee. If the legacy lapses in interest after the advances have been made the representative may recover them by an action in his own right as for money had and received.

Payment of Legacies.

In the payment of legacies the executor acts at his own peril unless he is acting under an order of the Court, and he must decide to whom legacies are to be paid. It is not in every case sufficient to pay the legacy to the person named or described in the will as legatee, for he may be under some disability. For example, if the legatee is an infant, the legacy cannot be paid to him nor to his father or any relative, for the proper person to whom such payment is to be made is a guardian duly appointed, and the same rule is true in the case of other persons under guardianship, such as lunatics, spendthrifts and the like. In this connection it is important to bear in mind that a guardian or trustee appointed in one State is not entitled to receive the payment of a legacy in another where the estate is being administered, but there should be a guardian duly appointed and given proper security in the latter State.

When a legacy is given generally to one for life and to others upon his death, the legacy should be paid to the legatee without requiring any security from him to secure the estate from waste in his hands, unless there appears to be danger of his wasting or removing the property. If the legacy is a specific legacy for life to one, and absolutely after the life estate to another, and the executor delivers it to the life tenant, and takes a proper receipt or inventory for the remainderman, he is discharged from further liability. In case the legatee has died, the legacy is payable to his administrator or executor. A legacy is liable to attachment or to trustee or garnishee process at any time after the interest in it has vested in the legatee. Therefore, when an executor has been summoned as trustee of a legatee, or the legacy has been attached, he is obliged to retain the legacy until the judgment in the case allows him to dispose of it, either by payment to the legatee or the plaintiff in the case as the judgment may be. It has been held that a specific legacy, for example,

of shares in stock standing in the name of the testator, may be attached for a debt due by his estate.

Unless a particular mode of paying a legacy is expressly prescribed by the will or by statute, payment may in general be made in any manner which gives to the legatee his due proportion of the estate and which shows an absolute payment. Usually, the payments should be made in money, although with the consent of the parties in interest it may be made in other kinds of personal property. It has been held that a deposit in bank to a legatee's credit without notice thereof does not constitute a good payment. A payment or distribution in kind of stocks, bonds, notes or other securities may be made where the parties interested consent thereto, or where it appears that a conversion of the securities into money should cause a loss. The effect of such a distribution is to discharge the representative from liability for such assets and to give to the legatee who receives the securities the right to maintain or defend suits with respect thereto.

Specific Legacies.

As to specific legacies, the increase of them from the time of the testator's death belongs to the legatee, and not the residuary legatee. Hence where there is a specific bequest of stock, the dividends belong to the legatee from the death of the testator, and the increase of cattle which has been specifically bequeathed likewise belongs to the legatee. General legacies carry interest from the time when they are payable. Although interest on a legacy is not allowed until the end of a year from the testator's death, yet when the income of a fund is given the income begins immediately upon the death of the testator and interest is allowed upon the income, if it is not paid at the end of the year from the testator's death, when it is due. The fact that there are not sufficient assets to allow the legacy to be paid when it is due does not prevent the accumulation of interest thereon until it is paid. When a legacy is given by a parent to a child or for the support of the child and no other provision is made for its maintenance, it is presumed that the testator intends the child to have the benefit of the legacy from the death of the testator, and it has consequently been held that interest begins to run in such a case from the death of the testator, although the legacy may not be payable until the legatee reaches his or her majority.

A payment or distribution properly made and receipted for is binding on the personal representative unless it can be impeached for fraud, mistake or improper means used in procuring it. It is also binding on the legatee or distributee who accepts the payment. After full payment or distribution the personal representative is released from further liability to the legatees or creditors for acts done in his representative capacity, and he cannot thereafter exercise any control over the property distributed.

After the payment of debts, the duty of the administrator in cases of intestacy is to distribute the estate among those entitled to it by law. The persons to whom and shares in which the estate shall be distributed are regulated by statute in all the States and have considerable similarity in their more important provisions.

In Pennsylvania a distinction is made between the estate which a woman holds as her separate estate and that which is governed by the rules of the common law. The husband takes the whole of the latter, while of the former he takes the whole only when there are no children. If there is a child or children, the surviving husband divides with them the personal estate of the decedent, share and share alike. In the case of the husband dying, the widow takes one-third of his personal estate, if there is issue; if none, but there are other kindred, she takes one-half; if there is no kindred, she takes all the personalty.

In the event of there being no surviving husband or widow, the personal estate of the decedent goes to the next of kin, which summarizing the law of Pennsylvania (which is practically the same as in other States), the personal estate goes first to the children and grandchildren by right of representation; second, to father and mother or their survivor; third, to collateral heirs as follows: (a) brothers and sisters of the whole blood; (b) uncles and aunts; (c) descendants of brothers and sisters; and, fourth, to next of kin.

The right to a distributive share is a vested interest, vesting in those entitled immediately on the death of the intestate, and, although a settlement of the estate is delayed, and a decree of distribution postponed, yet the decree of distribution when made relates back to the time of the decease of the intestate, and apportions the estate to the persons then entitled or their representatives.

The decree does not create the right, which is determined by the state of things at the intestate's death, but judicially

ascertains the distributees, the whole amount to be distributed and the amount of the distributive share of each. The administrator may, however, make a payment of a distributive share without the decree of the Probate Court, but he does so at his peril. If he pays the right amount to the right person, he will be credited with it in his accounts. And if money has been advanced by the administrator on account of the distributive shares, and he is compelled to pay interest on funds in his hands up to the time of accounting, he should charge interest on the advance made to the distributees; in the payment of distributive shares, any debt due to the estate from the distributee should be deducted from his share, and the Probate Court may determine the amount and validity of the debt and make proper order to give effect to the set-off and deduction.

Advancements made to children by the parents in their lifetime are generally considered as being part of the distributive share of the children in the intestate's estate and are to be reckoned as such in computing the proper distribution of the estate. This right to distribution arises in cases of partial as well as total intestacy. To illustrate, if there is a will, but also an estate not covered by the will, or if the will fails as to some portion of the estate which is not covered by any residuary clause, the intestate estate is distributed under the statute of distributions, as if there had been no will. Thus, if the deceased was a married man, and there is partial intestacy, his widow gets her distributive share, and, although she may die before distribution, yet her representative is entitled to her share.

The distribution of the estate among the various next of kin is governed by the law of the State where the deceased last dwelt, although it is different from that of the State where the goods are located, and the rights of next of kin depend upon the laws of the State of domicile. The domicile of a married woman is that of her husband, and the rights of a widow to her distributive share are governed by the laws of her husband's domicile.

Successive Administrators.

An outgoing executor or administrator before the estate is settled should render an account, stating a balance due to or by him to the estate, and should turn over the balance, if due by him to the estate, to the succeeding administrator. In case of the death of the executor or administrator, the same should be done by his executor or administrator. If a balance is due to

the estate, and is not turned over to the succeeding administrator, he may sue for it. If an account is not rendered as required the succeeding administrator may compel it.

From the above statement of law it will be observed that there is no privity of estate between successive administrators or their representatives, and a succeeding administrator becomes, by virtue of his appointment, the representative of the estate, so that he is entitled to call the preceding executor or administrator or his representative to account.

Cases also occur where the estate is indebted to the outgoing executor or administrator; as, for example, where he has advanced money to the estate, as in some cases he may properly do. These advances would naturally be settled by retainer by the outgoing executor or administrator or his representatives of funds enough belonging to the estate to satisfy the debt. However, it may be that the personal estate is insufficient for that purpose and then such advances become a charge upon whatever new assets come into the hands of the succeeding administrator, even upon the proceeds of real estate sold by him to pay debts, and this charge is not barred by the Statute of Limitations. The necessary relief in such a case is for the outgoing administrator or executor to cite the succeeding administrator to file an account upon which citation there would be a hearing at which the representatives of the deceased executor or administrator might ask for an order of Court for the payment of his claim. Such a claim should, however, be retained from the assets in his hands while he is still executor or administrator and an accounting made accordingly.

Removal or Resignation.

Having considered the qualifications of executors and administrators, their powers and duties, we will next inquire into the method by which their duties may be terminated and will conclude the subject with a brief review of the law regulating suits by and against them.

As the right to administer upon an intestate estate is regulated by statute, as has been previously seen, it follows that any person who is entitled to administration may, if he has not lost the right by his own act, as waiving or renouncing it, or by negligence in not claiming it when he ought, or not applying when cited, apply for the revocation of letters which have been granted to another wrongfully. This same principle applies where, after

an executor is duly appointed, a later will is found and duly proved, appointing another executor, or where, after an administrator has been appointed, as if the estate were intestate, a valid will be found and proved, in which cases the letters wrongfully granted will be revoked. The question arises, whether, when administration is granted as upon an intestate estate, and it afterward appears that a will was left by the deceased, or when administration is granted to one not entitled to it, the grant of administration is made void by the discovery of the will. Such an appointment is void if in derogation of the rights of the executor, and voidable if in derogation of the rights of the next of kin.

The same personal disqualifications which would prevent the appointment of an executor or administrator to the office will be sufficient reason for his removal, if occurring after his appointment. Insolvency alone, if it does not give ground for apprehending waste or loss to the estate, has been held in New Jersey not to be sufficient cause for revoking administration. But the opposite is the law in Pennsylvania and is probably the better rule.

Embezzling the estate or wasting it or mismanaging it, or committing a fraud on those entitled to the estate, is cause for removal. Failure to furnish bond, or to file an inventory and appraisement, or to file an account are all causes for the removal of an executor or administrator.

Provision is generally made by statute for the resignation by an executor or administrator of the office to which he has been appointed, and if the circumstances of the case show that he can do so without detriment to the estate, he is allowed to resign. In the absence of statutes, if he petitions to be discharged, the Court, viewing him as a trustee, will upon notice to all parties interested, or who might become interested in the estate, allow him to be discharged under the ordinary law of trustees.

Actions by and Against Executors.

An executor or administrator, before appointment, often has in his possession property belonging to the estate, and in such a case he may bring any suit which is for damages done to the possession merely, such as trespass or replevin. He may waive the tort, if the property has been converted, and sue in contract, on an implied agreement on the part of the wrongdoer to pay for the property which he has converted. Such actions would in

most cases be a complete defense of the possession of the property, since if the goods belonged to the estate no other person would have any better title than the executor or administrator; but if the goods were claimed by the party against whom the action is brought as his own, the executor or administrator would fail in his action, as he could not prove his title to the property by letters, since these were not yet granted.

As to goods which have never been in his possession, or which others claim by an apparently good title, the principle of the law that an executor gets his title from the will, while an administrator gets his from the grant of letters, results in the rule that while an administrator cannot begin a suit for such goods till the grant of letters, an executor may begin a suit before probate, and it is sufficient if he is prepared with his letters at the trial of the case. This holds true in cases where he has never had the actual possession of the goods, because his title as executor draws to it the constructive possession of the goods, which will be sufficient to support the action, and may be proved at the trial by the probate of the will. At the present time any suit by an executor which is based upon a title in him as such, except as above stated in regard to goods in his actual possession, must be brought after the Probate Court has granted his letters to him.

The executor or administrator may have certain rights of action accrued to the estate after the death of the testator or intestate. Thus, if any property belonging to the deceased is, after the death of the owner, taken away or injured by a third person, the executor or administrator may sue for his injury in the proper form of action and may do this either in his individual capacity or as executor or administrator, as the case may be, for the goods are supposed to be in his possession, although he may never have had their actual possession.

Moreover, contracts of the deceased may not be broken by the other party to the contract until after the death of the contractor and, though no cause of action accrues to the estate until such breach, the executor or administrator may sue upon it.

Partners on account of their peculiar relationship cannot sue each other at law for demands based upon partnership dealings during the existence of the partnership. Their only remedy is a bill in equity, in which all the demands and accounts of the partnership are brought together and settled, and the balance of assets or liabilities apportioned between them. This rule, which applies to all cases of settling the affairs of the partnership whenever it is dissolved, applies equally to the case when the partner-

ship is dissolved by the death of one of the partners. The manner in which the personal representative of the estate of the deceased partner obtains the settlement of their accounts is by a bill in equity, in which it is prayed that the partnership affairs be wound up, and that there be an accounting and payment to the plaintiff of whatever may be due to the estate. This accounting involves two sets of accounts: first, accounts of the partnership with strangers, and second, the accounts between the surviving partners and the estate of the deceased partner. All the partnership debts must be paid before anything is due to the estate, and, therefore, in such proceedings a creditor may intervene and obtain the payment of his debt. However, if the debts of the partnership are all paid, and there is nothing left but a division of the assets, and these assets are real estate, which can be divided up between the surviving partner and the heirs of the deceased partner, a Court of Equity will not interfere, and order a sale of the land, in order to convert the real assets into money, but will leave the partners to divide up the land. The surviving partners must account for all the profits which have been made in the business since the death of the deceased partner, as well as before and up to the time of closing the account, for his capital is still in the firm and is entitled to its share of the profits.

On the other hand an executor or administrator is bound by all the contracts of the deceased and may be compelled to perform them or to respond for the breach thereof in damages unless the contract is of such a nature as involves the prosecution of the business of the deceased, or is otherwise incompatible with the duties of the executor or administrator in settling the estate. Claims founded on any obligation, contracts, debt, covenant or other duty of the testator or intestate, upon which he might have been sued in his lifetime, survive his death, and are enforceable against his executor or administrator. Consequently executors or administrators are liable to be sued for debts of every description due from the deceased. Statutes have also been enacted in a majority of the States making action for damages arising out of tort survive the death of the party originally liable, so that his executor or administrator may be sued therefor.

Another liability arises in regard to contracts of the deceased as to conveyances of land. Regarding his contracts to buy land it is held in equity that if the deceased had entered into a binding contract for the purchase of land and died before the pay-

ment o. the purchase money, he thereby effected a conversion of so much of his estate into realty, and, therefore, the liability to pay purchase money devolves upon the executor or administrator, although the land goes to the heirs. A second liability is that if the deceased had entered into a binding contract for the sale of land, and died before executing the conveyance, the vendee may compel specific performance on the part of the executor or administrator.

CONSTITUTIONAL LAW.

*Articles of Confederation—Federal Constitution Analyzed—
Powers of Congress, Executive, Judiciary—Anti-Trust
Laws—Tariffs—Amendments.*

THE erudite Story defines a constitution to be a "fundamental law or basis of government." More broadly speaking, a constitution is that law of a State or a combination of States which contains the principles upon which government is founded, regulates the division of sovereign powers and directs to what person or body each of these powers is to be entrusted and the manner of its exercise. A constitution is to the departments of the government what a law is to individuals, and it is not only a rule of action to the branches of government, but it is that from which their existence flows and by which the powers which may have been committed to them are prescribed.

The most famous of all written constitutions is that of the United States, and derives its whole authority from the fact that it was ratified by conventions in the several States whose members were elected by the people. When thus adopted it became a complete obligation, and, therefore, bound the States and the citizens thereof. As our Constitution* is an agreement of the people in their individual capacities, reduced to writing, establishing and fixing certain principles for the government of themselves, it is invaluable to every citizen to have a thorough knowledge of the history of its formation, its general contents and the interpretation placed thereon by the courts established by it.

Articles of Confederation.

In 1775 a Congress composed of representatives of the American colonies appointed a committee to prepare a Declaration of Independence and a committee to prepare a plan of confederation for the colonies. Dr. Benjamin Franklin, as early as August 21, 1775, submitted to that body a sketch entitled "Articles of Confederation and Perpetual Union of the Colonies," which became a basis for the articles reported on July 12, 1776. These articles of confederation were amended from time to time until November 17, 1777, when Congress determined to propose

them to the States. The last State to ratify them was Maryland, on March 1, 1781. In the language of Chancellor Kent, "the exclusive cognizance of our foreign relations, the rights of war and peace, the requisitions of men and money, were confided to Congress, and the exercise of them was binding upon the States." But in imitation of all former confederacies of independent States, either in ancient Greece or modern Europe, the articles of confederation carried the decrees of the Federal Council to the States in their sovereign or collective capacity. This was the great fundamental defect in the confederation of 1781; it led to its eventual overthrow, and it has proved pernicious or destructive to all other federal governments which adopted the principle.

Disobedience to the laws of the Union must either be submitted to by the Government, to its own disgrace, or those laws must be enforced by arms. The mild influence of the civil magistrate, however strongly it may be felt and obeyed by private individuals, will not be heeded by an organized community, conscious of its power and swayed by its passions. The history of the Federal Government of Greece, Germany, Switzerland and Holland afford melancholy examples of destructive civil war springing from the disobedience of the separate members. The weakness of the Confederation and the need of the substitution of a more stable system was pointed out by Alexander Hamilton in a letter to James Duane, September 3, 1780.

The Constitution.

In May, 1785, Congress failed to act on the report of a committee recommending an alteration of the first paragraph of the ninth of the Articles of Confederation, so as to enlarge the powers of Congress, especially as to trade; and the Legislature of Virginia, on January 21, 1786, appointed commissioners to meet such commissioners as might be appointed by other States to examine the relative situation and trade of such States, to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony; and to report to the several States such an act relative to this great object as, when unanimously ratified by them, will enable the United States in Congress effectually to provide for the same. The Commissioners of only four States besides Virginia, to wit, Delaware, Pennsylvania, New Jersey and New York, met in Annapolis on the first Monday in September, 1786. A report drawn by Alexander Hamilton was agreed upon,

recommending that commissioners from all the States meet on the second Monday of the following May.

As a result a convention of delegates from all the original thirteen States, except Rhode Island, met at Philadelphia, May 14, 1787. On September 17 a form of Constitution was unanimously agreed upon, and on September 28 submitted to the Congress of the Confederation. Conformable to recommendations as to its adoption, it was sent by the Congress to the State Legislatures in order to be ratified or rejected by conventions of delegates chosen in each State by the people. The several State conventions ratified the Constitution as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 22, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; New York, July 26, 1788; North Carolina, November 21, 1788; Rhode Island, May 27, 1790. Article VII of the Constitution provides that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." The ratification by the ninth State was read to Congress on July 2, 1788, and on September 13 Congress passed the following: "Resolved, That the first Wednesday in January next be the day for appointing electors in the several States which before the said day shall have ratified the said Constitution; that the first Wednesday in February next be the day for the electors to assemble in their respective States and vote for a President, and the first Wednesday in March next be the time and the present seat of Congress (New York) the place for commencing proceedings under the said Constitution." Proceedings having taken place conformably to this resolution, Washington took the oath of office on April 30, and Congress met on March 4. Owing to the want of a quorum the House did not organize until April 1, nor the Senate until April 6. The Supreme Court has held that the operation of the Constitution "did not commence before the first Wednesday in March, 1789." In view of the compact between the States, it is not possible for a single State, without violating this agreement, to withdraw from the Union or to deprive itself of its rights as one of the United States.

Having briefly outlined the history leading up to the adoption of the Constitution, before taking up its specific provisions, let us inquire first into its general effect and application.

When the Constitution was ratified the thirteen original States were existing governments, and those States which have been admitted into the Union since 1789 have, as regards the United States and the other States, the same rights, powers and obligations as the thirteen original States. The result is, and it is extremely important to bear in mind, that in so far as the States are not controlled by the express or implied restrictions contained in the Constitution of the United States they may severally exercise all the powers of independent government. The authority of the Constitution is, of course, sovereign, but so far as their freedom of action is not controlled by that instrument, the States united thereunder are independent of one another.

In its relation to the several States and the citizens thereof, the United States Government is one of delegated and limited powers. The Constitution emphatically states in the language of its well-known preamble that it is established by the people, not the States, which rendered the States dependent and subordinate for all specific purposes for which it was adopted.

Three Governmental Branches.

There is created by the Constitution a government divided into three departments, legislative, executive and judicial. The duty being vested in the executive department to administer the laws of Congress, and the primary duty of the judicial department being to expound the Constitution and the laws in their application to subject matters of judicial cognizance, either civil or criminal, it is manifest that the powers conferred upon the Government of the United States by the Constitution are principally powers of legislation. These powers are either expressed or implied, the former being such as are specifically stated, whereas the latter are those which authorize the use of appropriate means which are consistent with the letter and spirit of the Constitution for the accomplishment of legitimate ends which are not prohibited and which are within the scope of the Constitution. Certain express exceptions are made to the powers granted by the Constitution to the United States, contained in the ninth section of Article I and in the first eleven of the amendments.

Section 2 of Article VI provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme

law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." By virtue of this article, the Government of the United States is, in the language of that immortal expounder of the Constitution, Chief Justice Marshall, "though limited in its powers, supreme within its sphere of action, and to the extent and in the exercise of the powers delegated to it, it is a sovereignty."

The Constitution imposes certain restraints upon the several States, the same being either expressed or implied. The express restraints are, of course, those specifically set forth in the Constitution. Implied restraints are those which result from the express grant by the Constitution of certain powers whose nature or the terms of whose grant require that they should be exclusively exercised by the United States. Included among the express restraints are those which affect the relations of the several States to other States, foreign and domestic; and, second, those which have reference to the relations between the States and their citizens, and which limit the exercise by these States of their power of legislation. The prohibition against making treaties, alliances, confederations, agreements or compacts with another State, or with a foreign Power is an illustration of an express restraint of the first class. Forbidding a State to grant titles of nobility, to coin money, to impose duties of tonnage and duties on imports or exports; the prohibition against depriving any person of life, liberty or property without due process of law, illustrate express restraints of the second class.

The implied restraints limit the action of the States with regard to taxation, the regulation of commerce and the personal and property rights of their citizens, and of the citizens of other States.

The territory owned at the time the Constitution was adopted and that acquired subsequently thereto are subject to its terms and provisions the same as any State, by virtue of the clause providing that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." In consequence of this authority the Supreme Court decided in the famous Insular cases that Congress could, after the acquisition of Porto Rico as territory of the United States, impose duties upon importations into ports of the United States from Porto Rico, and into ports of Porto Rico from the United States and foreign countries.

Federal Constitution Analyzed.

Having indicated the general nature and application of the Constitution of the United States, together with the leading principles adopted for its construction, we are now in a better position to discuss its separate provisions more intelligently.

There are three departments of government provided for by the Constitution, to wit, Legislative, Executive and Judicial.

Article I vests the legislative power in a Congress consisting of a Senate and House of Representatives. The system of apportionment of representatives in Congress, their qualifications, the method of organizing both branches, together with their general powers, set forth in the first seven sections of Article I, are well known and require no special comment. All bills for raising revenue must originate in the House of Representatives, but the Senate may or may not concur with amendments as on other bills. Every bill passing the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States, who must sign same if meeting his approval; if not, it must be returned to that House in which it originated, where the objections are entered on the journal, and a reconsideration taken. If upon reconsideration two-thirds of that House shall agree to pass the bill it must be sent, together with the objections, to the other House, by which it must likewise be reconsidered and approved by two-thirds of that House, when it shall become a law. If a President fails to return a bill within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law the same as if he signed it, "unless Congress by their adjournment prevent its return, in which case it shall not become a law." Not only every bill, but every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), must be presented to the President of the United States, and before the same becomes effective it must be approved by him, or, being disapproved, must be re-passed by two-thirds of the Senate and House the same as in the case of a bill.

Powers of Congress.

The eighth section of Article I, particularly enumerating the powers of Congress, is one of such transcendent importance as to warrant a very careful inquiry. Under this section Congress is empowered:

1. To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. But all duties, imposts and excises shall be uniform throughout the United States.

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations and among the several States, and with the Indian tribes.

4. To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy, throughout the United States.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

7. To establish postoffices and post-roads.

8. To promote the progress of science and useful arts by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries.

9. To constitute tribunals inferior to the Supreme Court; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

10. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

12. To provide and maintain a navy.

13. To make rules for the government and regulation of the land and naval forces.

14. To provide for calling forth the militia to execute the laws of the nation, suppress insurrections and repel invasions.

15. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of officers and the authority of training the militia according to the discipline described by Congress.

16. To exercise exclusive legislation in all cases whatsoever, over such district not exceeding ten miles square, as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall

be for the erection of forts, magazines, arsenals, dockyards and other needful buildings.

17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

The Taxing Power.

The most necessary power granted to Congress is the first mentioned—i. e., “to lay and collect taxes,” etc. Taxation is the compulsory exaction by a government, in the exercise of its sovereignty, of a payment or surrender of property by any person, natural or corporate, who or whose property so taxed is subject to the sovereign power of that government. The power to levy and collect taxes, duties, imposts and excises is co-extensive with the territory of the United States. A public use or purpose is essential to the idea of tax, and a tax for a private purpose is unconstitutional, and Congress is not empowered to tax for those purposes which are within the exclusive province of the State. Every possible exaction of money or property by a government from those who are subject to its jurisdiction is not a tax; thus a duty of so much per passenger imposed by the United States in the exercise of the power to regulate commerce, on owners of vessels bringing passengers from foreign ports into ports of the United States, in order to raise a fund to mitigate the evils incident to immigration, is “not a tax or duty within the meaning of the Constitution.” There is one execution and two qualifications to the power of Congress to levy and collect taxes. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, the taxing power reaches every subject and may be exercised at discretion.

The requirement of uniformity means that there must be geographical uniformity, or, in other words, that “wherever a subject is taxed anywhere, the same must be taxed everywhere, throughout the United States and at the same rate,” and taxation is uniform when it operates with the same effect in all places where the subject of taxation is found, though that subject be not equally distributed throughout the United States.

It is well settled that the United States cannot tax the agencies of a State, as, for example, the salary of a judicial officer of a State, nor the revenue of a municipal corporation derived from its loan of capital to a railway.

Every individual State may, so far as it is not restrained by

the Constitution, tax all persons, natural or corporate, and all property, real or personal, within its territory and subject to its sovereignty, and may regulate the manner of levying and collecting its taxes. It has been held that under the general rule which permits a government to tax all persons and property within its jurisdiction, the States may impose a duty on the devolution of title to real estate from their citizens to alien non-residents; they may tax descents and inheritances and they may classify and vary the rate of taxation with reference to lineal and collateral relationship; a State may tax mortgages of lands within their limits. A State cannot tax the operations of banks incorporated by the Government of the United States as fiscal agencies. In the case of national banks, State taxation is by the forty-first section of the act of June 3, 1864, permitted as to the shares in any bank when "included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State."

Congress has not an unlimited power of taxation, but it is limited to specific objects—the payment of the public debts and providing for the common defense and general welfare. A tax, therefore, laid by Congress for neither of these objects would be unconstitutional as an excess of its legislative authority.

Having ascertained that the power of taxation, though general as to the subjects to which it may be applied is yet restrictive as to the purposes for which it may be exercised, it next becomes matter of inquiry, what were the reasons for which this power was given and what were the objections to which it was deemed liable? It was admitted by all that the power of taxation should be vested in the National Government. Without such a power it would not be possible to provide for the support of the national forces by land or sea or the national civil list or the ordinary charges and expenses of the Government. For these purposes, at least, there must be a constant and regular supply revenue. If there should be a deficiency one of two evils must inevitably ensue, either the people must be subjected to continual arbitrary plunder or the Government must sink into a fatal atrophy. The former is the fate of Turkey under its sovereigns, the latter threatened to be the fate of America under the Confederation. The power of taxation must be co-extensive with the powers, wants and duties of the National Government.

The only inquiry properly remaining is whether the resources of taxation should be specified and limited or whether the power in this respect should be general, leaving a full choice to the national legislature. Every Government ought to con-

tain within itself every power requisite to the full accomplishment of the objects committed to its care, and the complete execution of the trusts for which it is responsible, free from every other control, but a regard to the public good and to the security of the people. In other words, every power ought to be proportionate to its objects. As stated by Chief Justice Story in his Commentaries: "Revenue is the essential engine by which the means of answering the national exigencies must be procured; and therefore the power of procuring it must necessarily be comprehended in that of providing for those exigencies." Theory as well as practice conspire to prove that the power of procuring revenue is unavailing and a mere mockery when exercised over States in their collective capacities. If, therefore, the Federal Government was to be of any efficiency and a bond of union it ought to be invested with an unqualified power of taxation for all national purposes.

Taxes are either direct or indirect, and it is important to clearly understand the difference. The Constitution, by giving the power to lay and collect taxes in general terms, doubtless meant to include all sorts of taxes, whether direct or indirect. Under the former denomination are included taxes on land or real property, and under the latter taxes on articles of consumption.

The fourth clause of the ninth section of the first article declares that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." Ordinarily all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes, and taxes imposed upon individuals in their personal capacity or upon individuals in respect of their ownership of their property are direct taxes. The Supreme Court in one of its earliest decisions ruled that a tax on carriages for the conveyance of persons was an excise and therefore an indirect tax. In the argument Alexander Hamilton said: "The following are presumed to be the only direct taxes: Capitation, or poll taxes; taxes on land and buildings; general assessments, whether on the whole property of individuals or on their whole real or personal property. All else must of necessity be considered indirect taxes."

Income Tax.

Certain statesmen have from time to time advocated the imposition of an income tax. But it is the consensus of economic authorities that the income tax laws, even when wisely framed,

should be reserved only for great public emergencies, for the reason that they are necessarily unequal in operation in that they fall most heavily on those who conscientiously make full returns; and that when resorted to they should tax impartially the surplus income of every citizen over and above that minimum which suffices for the necessities of the life of an individual, and that incomes received from salaries or from professional compensation, if taxed at all, should, by reason of their terminable character be less heavily taxed than incomes derived from invested funds. Under the income tax legislation of 1861 and its supplements, when the amount exempted was \$600, the tax was paid by only 460,000 persons, and when the amount exempted was \$1,000, the tax was paid by less than 250,000 persons. The population and wealth of the country had largely increased in the years preceding 1894, but it is certain by reason of the larger amount exempted from taxation under the act of that year, the burden of the tax imposed by that law would have been borne by a relatively small number of persons, certainly not more than two per cent. of the population of the country.

The income tax law of 1894 was a very objectionable specimen of class legislation. Not content with exempting the minimum amount which suffices for the necessities of the life of an individual, and which in 1894 certainly did not exceed \$600, it enlarged the exemption to \$4,000. It made no distinction between income received from salaries or as professional compensation and income derived from invested securities. The constitutionality of that act came before the Supreme Court of the United States in 1895. It was at first decided that so much of the act as provided for levying taxes upon incomes derived from real estate was invalid, because such taxes are in legal effect taxes upon real estate and are as such direct taxes which can only be imposed according to the rule of apportionment, and that so much of that act as taxed income derived from investments in State, county and municipal securities was invalid, because they were taxes on the States and on their instrumentalities of government. Upon a re-hearing of the argument on this question the Supreme Court decided in addition to the points decided at the first hearing that a tax on an individual in respect of his income derived from real or personal property is a direct tax, and therefore can be laid only under the rule of apportionment.

Other Provisions.

In order to prevent the necessity of recurring again to the subject of taxation it seems desirable to bring together in this connection all the remaining provisions of the Constitution on this subject, though they are differently arranged in that instrument. And it might be here remarked that it is impracticable for the purposes of this discussion to dilate at length upon the separate provisions of the Constitution, our object being to elaborate merely upon the more important provisions.

The Constitution provides that "No tax or duty shall be laid on articles exported from any State." No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.

The object of these provisions is to prevent any possibility of applying the power to lay taxes or regulate commerce injuriously to the interests of any one State so as to favor or aid another. If Congress were allowed to lay a duty on exports from any one State it might unreasonably injure or even destroy the staple productions or common articles of that State. The inequality of such a tax would be extreme. In some of the States the whole of their means result from agricultural exports. In others a great proportion is derived from other sources. The power to intermeddle with the subject of exports is wholly taken away. On the other hand, preferences might be given to the ports of one State by regulations either of commerce or revenue which might confer on them local facilities or privileges in regard to commerce or revenue. And such preferences might be equally fatal if indirectly given under the milder form of requiring an entry, clearance or payment of duties in the ports of any State other than the ports of the State to or from which the vessel was bound. The last clause, therefore, does not prohibit Congress from requiring an entry or clearance or payment of duties at the custom house on importations in any port of a State to or from which the vessel is bound, but it cuts off the right to require such acts to be done in other States to which the vessel is not bound.

Restraints.

The succeeding clause of the Constitution contains a prohibition on the States for the like objects and purposes. "No State shall, without the consent of Congress, lay any imposts or

duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress. No State shall without the consent of Congress levy any tonnage duty." If there is wisdom and sound policy in restraining the United States from exercising the power of taxation unequally in the States, there is at least equal wisdom and policy in restraining the States themselves from the exercise of the same power injuriously to the interests of each other. The power to enforce their inspection laws is still retained by the States, subject to the revision and control of Congress, so that sufficient provision is made for the convenient arrangement of their domestic and internal trade, whenever it is not injurious to the general interests.

Power to Regulate Commerce.

Of equal importance to the power of taxation is the power vested in Congress to regulate commerce with foreign nations, and among the several States and with the Indian tribes. This is perhaps the most elastic clause in the whole Constitution. The only commerce the framers of the Constitution knew was the foreign and coastwise commerce that was carried in ships. They little thought that the time would ever come when the commerce so carried would be far exceeded in amount and in value by the internal commerce of the country, yet that time has come. In the years that have passed since the adoption of the Constitution the country has made great strides and has increased from less than three million to more than ninety million people. Discoveries in science and inventions in the arts have developed new subjects of trade and have created new agencies of commerce. Sailing vessels have given way to steamships, and railways have superseded turnpike roads, Conestoga wagons and canals for the transportation of passengers and freight. Telegraphs and telephones have annihilated distance, and in view of these great changes in conditions it is more than ever important that the constitutional limits upon the regulation of commerce should be clearly comprehended, and that the line which separates the provinces of Federal and of State authority over this subject of national interest should be so far as possible accurately defined.

The want of the power to regulate commerce was one of the

leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the Constitution.

The term "commerce" as defined by Chief Justice Marshall means not only traffic, but also commercial intercourse in all its branches, including transportation by sea and on land, importation and exportation and all that is necessarily incident thereto. The power conferred is to regulate or prescribe the rule by which commerce is to be governed. Commerce undoubtedly is traffic; but it is also something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches. Commerce includes navigation. The power over navigation was one of the primary objects for which the people of America adopted their government.

It should be borne in mind, however, that everything that is connected with commerce is not necessarily commerce. Bills of exchange may be given in payment for goods to be imported and yet such bills are mere personal obligations and are not in themselves subjects of commerce. It has also been held that money assessed for State taxation is not by a subsequent investment in a subject of commerce relieved from such taxation. So also a contract of insurance is not "an instrumentality of commerce," but a mere incident of commercial intercourse. A State may, therefore, prohibit foreign insurance companies and their agents from effecting within its territory contracts of insurance, save upon such conditions as the State may prescribe, but a State cannot prohibit its citizens from effecting in another State a contract of insurance. Insurance, commercial paper and trademarks are certainly as nearly related to and as truly incidents of commerce as a telegraphic inquiry as to the state of the market or a telegraphic order for the forwarding of goods, though, unlike the bill of lading, they do not represent the goods. Lottery tickets are subjects of traffic and the carriage of such tickets by independent carriers from one State to another is interstate commerce. The Supreme Court has also ruled that the transfer of shares of railway companies is interstate commerce when such shares are transferred for the purpose of vesting in a holding company a majority of the shares of two competing railways engaged in interstate traffic.

In regard to commerce with foreign nations, it is universally admitted that the words comprehend every species of commercial intercourse. No sort of trade or intercourse can be carried on between this country and another to which it does not extend. This phase of commerce comes more properly under international

law, and we will therefore confine our inquiry to commerce among the States. A very material object of this power is the relief of the States which import and export through other States from the levy of improper contributions on them by the latter. If each State were at liberty to regulate the trade between State and State it is easy to foresee that ways would be found out to load the articles of import and export during their passage through the jurisdiction with duties which should fall on the makers of the latter and the consumers of the former.

It was pointed out previously that the power of Congress to regulate commerce is exclusive, at least in all cases where the subjects over which it is exercised are, in their nature, national or admit of one uniform system or plan of regulation. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

Over the internal commerce of a State Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. In view of this fact the United States cannot license the sale of liquor in violation of the laws of any State.

Navigable Waters.

The question has been frequently raised: How far any State possesses the power to authorize an obstruction of any navigable stream or creek in which the tide ebbs and flows, within its territorial limits, as by authorizing the erection of a dam across it? The Supreme Court of the United States has decided that the power of Congress to regulate commerce included the power to determine what should or should not be deemed, in judgment of law, an obstruction to navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation and subject to all the requisite legislation by Congress.

A State may, however, rightfully regulate the exercise of the right of fishing in its navigable waters, and enforce by judicial proceedings a forfeiture of vessels whose navigators fail to conform to the regulations so prescribed, and a license to navigate granted by the United States confers no immunity from

the operation of such regulations. The power granted to the United States of jurisdiction in admiralty does not carry with it a cession of navigable waters, or of general jurisdiction over them. Consequently a murder committed on a vessel of the navy of the United States while at anchor in navigable waters within the jurisdiction of a State does not come within the jurisdiction of a United States Court.

The ferries across a river within the limits of one State are not within the power of Congress over commerce, and consequently the acts requiring boats engaged in the coasting trade to be registered and licensed do not apply thereto. A tax on railroad companies for every passenger carried out of the State by them is not void as a regulation of commerce in the absence of any conflicting regulation by Congress.

A review of the cases will show that of late the Supreme Court has recognized a clear distinction between those cases in which State regulations are admissible and those in which they are not, which in view of its importance it is well to state in the language of the Supreme Court: "Whatever subjects of the power over commerce are in their character national, or admit of one uniform system or plan of regulation, are to be regarded as within the exclusive control of Congress, but other subjects, which are to be regulated in view of local circumstances and facts, and which can usually be best regulated by State legislation, are, until Congress acts in the matter, subject to such legislation."

Tariffs.

The question arises whether Congress has the constitutional authority to apply the power to regulate commerce for the purpose of encouraging and protecting domestic manufactures. It is not denied that Congress may, incidentally, in its arrangements for revenue, or to countervail foreign restrictions, encourage the growth of domestic manufactures. It is insisted, however, that under the color of regulating commerce Congress has no right permanently to prohibit any importations, or to tax any unreasonably for the purpose of securing the home market to the domestic manufacturer, as they thereby destroy the commerce entrusted to them to regulate, and foster an interest with which they have no constitutional power to interfere. This opinion constitutes the leading doctrine of several of the Southern States. On the other hand, it is as earnestly maintained that

Congress does possess the constitutional power to encourage and protect manufactures by appropriate regulations of commerce. It, therefore, becomes indispensable to review the grounds upon which the doctrine of each dominant party is maintained and to sift them to the bottom, since it cannot be disguised that the controversy over the tariff agitates the whole country and marks the divisions of party by the strongest lines, geographical and political. This inquiry is of particular importance in view of the present demand for tariff revision.

The reasoning by which the doctrine is maintained, that the power to regulate commerce cannot be constitutionally applied as a means directly to encourage domestic manufactures, is to the following effect: The Constitution is one of limited and enumerated powers; and none of them can be rightfully exercised beyond the scope of the objects specified in those powers. It is not disputed that when the power is given all the appropriate means to carry it into effect are included. Neither is it disputed that the laying of duties on imported goods is nor may be an appropriate means of regulating commerce. But the question is a very different one whether, under pretense of an exercise of the power to regulate commerce, Congress may in fact impose duties for objects wholly distinct from commerce. The question comes to this—whether a power exclusively for the regulation of commerce is a power for the regulation of manufactures? The statement of such a question would seem to involve its own answer. Can a power granted for one purpose be transferred to another? If it can, where is the limitation in the Constitution? Are not commerce and manufactures as distinct as commerce and agriculture? If they are, how can a power to regulate one arise from a power to regulate the other? It is true that commerce and manufactures may be intimately connected with each other. A regulation of one may injuriously or beneficially affect the other. But that is not the point in controversy. It is whether Congress has a right to regulate that which is not committed to it, under a power which is committed to it, simply because there may be an intimate connection between the powers. If this were admitted, the enumeration of the powers of Congress in the Constitution would be wholly unnecessary. The wages of labor, the profits of stock, the rents of land and the performance of contracts would all be within the scope of the power to regulate commerce, for all bear an intimate relation to commerce. When duties are laid on certain classes of imported goods, not for purposes of revenue, but of retaliation and restric-

tion to countervail foreign restrictions, they are strictly within the scope of the power, as a regulation of commerce. But when laid to encourage manufactures they have nothing to do with it. The power to regulate manufactures is no more confided to Congress than the power to interfere with the systems of education, the poor laws or the road laws of the State.

Having given in substance of the argument of those who deny the constitutional right of Congress to impose tariffs on imported goods for the purpose of protecting home industries, we will turn briefly to the argument of those upholding this right, which is to the following effect: The power to regulate commerce being in its terms unlimited, includes all means appropriate to the end, and all means that have been usually exerted under the power. No one can doubt or deny that a power to regulate trade involves a power to tax it. The American colonies wholly denied the authority of the British Parliament to tax them, except as a regulation of commerce, but they admitted this exercise of power as legitimate and unquestionable. The distinction was with difficulty maintained in practice between laws for the regulation of commerce by way of taxation and laws which were made for mere monopoly or restriction, when they incidentally produced revenue. And it is certain that the main object of parliamentary regulations of trade with the colonies was the encouragement of manufactures in Great Britain. In commercial and manufacturing nations the power to regulate commerce has embraced practically the encouragement of manufactures. When the Constitution was framed, no one ever imagined that the power of protection of manufactures was to be taken away from all the States, and yet not delegated to the Union. The terms of the Constitution it is thought are sufficiently large to embrace the power; the practice of other nations and especially of Great Britain and the American colonies has been to use it in this manner; and this exercise of it was one of the very grounds upon which the establishment of the Constitution was urged and vindicated. If Congress does not possess the power to encourage domestic manufactures by regulations of commerce, the power is annihilated for the whole nation. Here, then, is a case of laying duties, an ordinary means used in executing the power to regulate commerce; how can it be deemed unconstitutional? If it be said that the motive is not to collect revenue, what has that to do with the power? In other words, when an act is constitutional as an exercise of a power, can it be unconstitutional from the motives with which it is passed? If it

can, then the constitutionality of an act must depend not upon the power, but upon the motives of the Legislature, and it would hence follow, as a consequence, that the same act passed by one Legislature will be constitutional and by another unconstitutional. The constitutionality of an act would thus depend upon processes utterly vague and incomprehensible. The manner of applying a power may be an abuse of it, but this does not prove that it is unconstitutional. At any rate, the above sets forth the arguments of both dominant parties upon the constitutionality of acts of Congress imposing tariff duties on imported goods.

Section 9 of Article 1 of the Constitution expressly forbids Congress to tax exports; but this prohibition applies to foreign and does not apply to interstate commerce, nor to goods imported from the United States into Porto Rico. Internal revenue stamps required to be placed by the manufacturer upon articles for exportation do not fall within the prohibition.

The Constitution forbids the States to impose any duty on tonnage (Section 10 of Article 1). The word "tonnage" as applied to American shipping means their entire internal capacity, expressed in tons of 100 cubical feet each, as estimated and ascertained by those rules of computation which are prescribed by acts of Congress. Port dues being charges imposed on vessels as instruments of commerce and payable by all vessels entering, remaining in or leaving a port are regulations of commerce and as such cannot be imposed by State authority. A State may regulate pilotage in the absence of legislation by Congress. Goods shipped in one State destined to points in another State are subject to regulation by Congress, whether or not such goods ever in reality leave the borders of the State of shipment. As soon as goods are placed in transit which are destined to points in another State, they become interstate commerce and subject to regulation by Congress.

The United States may in the discretion of Congress authorize or prohibit improvements in the waterways used in foreign or domestic commerce. It may change the established channels of rivers and dredge harbors, and the action of Congress is exclusive of any right to the contrary asserted under State authority.

A State may tax goods brought in from another State, though in the hands of the consignee and in the original packages, but a State cannot by taxation discriminate against either the natural products of or the goods manufactured in other States, whether by requiring of every non-resident trader as a

prerequisite to his sales of other than agricultural products of or articles manufactured in the State a higher license fee than is required of traders in domestic goods. A State which taxes the traffic in any intoxicating liquors at any place other than the place of manufacture does not impose a discriminating tax upon a dealer in liquors manufactured in another State. Upon the same principle it has been held that a State may prohibit the sale of oleomargarine in imitation of butter, and that the act of Congress, of August 2, 1886, defining butter and imposing a tax upon oleomargarine does not authorize transportation and sale in violation of such a statute. It has likewise been held that a State may prohibit the sale of cigarettes brought in from another State, when the size of the original package is such as to indicate an intention to sell at retail that which the State in its exercise of the police power has forbidden to be sold.

The construction of railway systems has required the courts to consider in many cases the respective powers of the United States and of the States in regard to transportation. Under the later cases a State may, in the exercise of its police power, regulate transportation so far as may be necessary for the protection, safety and comfort of its citizens, but it cannot by such regulations unnecessarily impede or obstruct interstate commerce, the power to regulate which is vested in Congress by the clause under consideration.

A State may fix and enforce maximum rates of fare and freight for interstate transportation on all railways within the State, even though the people in other States may be indirectly affected thereby. A State may appoint a commission to revise railway tariffs, but same must not interfere with interstate commerce. A State may also prohibit the running of freight trains on Sunday on any railway within the State. A State may authorize its railways commission to require a railway to erect and maintain stations at designated points. These rights are based on the ground that it is proper for a State in the exercise of its police power to make such regulations as are of a purely local nature and appertain to the internal welfare of the State, the restriction being that such laws enacted by a State must not assume to interfere with interstate commerce. Otherwise one State could legislate injuriously to another, to prevent which the power over interstate commerce is vested exclusively in Congress.

The anti-trust laws passed by Congress by virtue of the

power to regulate commerce, which are of such vital importance at the present time, will be next discussed.

"Trusts."

In view of the growing sentiment in favor of the proper regulation of Trusts and monopolies by the Government, let us inquire into the constitutional right of Congress to legislate with this end in view.

A Trust has been defined as "a combination of corporations and properties made, in some cases, by the merger and consolidation of existing associations and in other cases by the organization of corporations to acquire and to hold the properties to be consolidated, or the controlling interest in the shares of the corporations to be combined." In other words, "Trusts" may be regarded as combinations of individuals or corporations formed to obtain capital by the sale of stocks and bonds, to save the waste of competition, to secure in production, transportation and distribution the maximum of efficiency at the minimum of cost; to expand trade by reducing the price to the consumer, and by economical operation to increase the net profit to the producer.

There are four classes of people to be considered in any legislative regulation of Trusts by the United States. First—the investors in the bonds and shares issued by the so-called Trust. Second—the business rivals or competitors of such Trusts. Complaint is made on their behalf that the Trusts in order to destroy competition discriminate in their prices. Third—the consumers of the goods manufactured or sold by the corporations or Trusts. So far as this class is concerned, it is clear that no act of legislation can effectively prescribe the price at which the products of the corporation are to be sold, for the simple reason that market prices have always been and always will be regulated by the operation of the law of supply and demand. It is a well-recognized truth that successful commerce buys in the dearest markets. The fourth class to be considered in regulating Trusts are those who or whose goods are carried by common carriers.

It is contended that Trusts have a tendency to monopoly. But intelligent managers of a successful business do not advance prices to the point at which destructive competition will be invited. When by reason of an apparent permanence of demand and a present inadequacy of the means of supply prices rise

to a level that gives a reasonable assurance of profit to producers, the surplus capital of the world can always be relied on to augment the means of supply.

Legislation enacted for the purpose of regulating trade is of ancient origin. In the Middle Ages the theory prevailed that it was the duty of the Government to fix the hours of labor, rates of wages, time and places of sale, etc. The policy of England directed to the restraint of colonial trade caused the Revolutionary War, after which there was a natural jealousy of governmental power and a determination to guard individual liberty against oppression. Consequently, when the Constitution of the United States was framed a government was founded not only upon the supremacy of the Federal Government in the exercise of the powers granted to it, but likewise upon the independence of the States and the freedom of the citizen.

As voiced in the very recent opinion of Judge Gray in construing the Hepburn act, it is to the States, and not to the United States, that we ought to look for the legislative and administrative regulation of the industrial organizations of the present and the future, which power of the State is ample. It is well known that a State may create corporations, with or without conditions, and it may authorize a corporation to do any business which an individual may lawfully do, and it may furthermore forbid a foreign corporation to do business within its territory. The United States cannot even grant a charter of incorporation, except as a means incidental to the exercise by the United States of a power of government. The United States assumes to control the operations of a corporation chartered by a State only under the power of regulating foreign and interstate commerce. But, as has been forcibly stated by our courts, the scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest. Any legislation which conflicts with the American doctrine that all men are equal before the law, and that equality of rights implies equality of obligations, and that subject rights of property and freedom of contract to administrative control is dangerous in a republic governed by universal suffrage.

Anti-Trust Legislation.

The first "anti-trust act" passed by Congress was drafted by the late Senator Hoar, of Massachusetts, and was passed because of public clamor as to "the grave evil of the accumu-

lation in this country of vast fortunes in single hands or of vast properties in the hands of great corporations."

The act of July 2, 1890, declares illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or Territories, or with foreign nations; and every monopoly or attempt to monopolize any part of such trade or commerce subjects to forfeiture, seizure and condemnation any property owned under any contract, or by any combination, or person, pursuant to any conspiracy. This act also gives a right of action for injury to business or property by reason of anything declared unlawful by the act, with threefold damages, costs of suit and attorney's fee, and further requires the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

Under the terms of the act of February 14, 1903, the Bureau of Corporations in the Department of Commerce and Labor was created. This act authorizes the Commissioner of this bureau to make, under the direction and control of the Secretary of Commerce and Labor, "diligent investigation into the organization, conduct and management of the business of any corporation, joint-stock company, or corporate combination engaged in commerce among the several States and with foreign nations, excepting common carriers subject to the Interstate Commerce act, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained, or as much thereof as the President shall direct, shall be made public. Congress further made it the duty of this bureau to gather, compile, publish and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce, or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law.

The term "contracts in restraint of trade" in the act making same unlawful includes without regard to their reasonableness or unreasonableness all kinds of those contracts which, in fact, restrain or may restrain trade. Under the conditions of trade in the time of the old year books any restraint of trade was an

unlawful restraint, but under modern conditions the test of invalidity is the unreasonableness of the restraint, for an agreement would not necessarily be in restraint of trade, although its direct effect might be to restrain to some extent the trade which had been done.

Labor Unions.

A combination of labor (labor unions) is from a logical standpoint as clearly subject to the statute as any combination of capital. The labor unions reasonably restrain trade when they combine to sell a certain minimum of labor for not less than a certain price, but they unreasonably restrain trade when, in order to effect their purpose, they use threats and force to prevent employers from securing labor not provided by members of the union. The courts have taken the view that in the absence of an express and unfulfilled contract of service, it is the legal right of every man to refuse to work, but it is neither the legal nor the moral right of any man to hinder other men from working.

The act of July 2, 1890, popularly known as the Sherman Anti-Trust law, has been construed to forbid an agreement by several corporations organized under the laws of different States and engaged in the manufacture, interstate transportation and sale of a commodity, to abstain from competition as between themselves within a designated territory, including more than one State. In the famous Northern Securities Company case, it was held to forbid a combination by several persons whereby a holding corporation is organized under the laws of a State to acquire and hold the majorities of the shares of two railways organized under the laws of other States and theretofore competing in interstate traffic. This important statute is to be construed, in its application, according to the "rules of reason"; the combination in restraint of trade, in order to come within the inhibition of the act, must be unreasonable.

In view of their importance, especial stress has been laid upon the power of Congress to impose taxes and to regulate commerce. Various other powers are vested in the legislative branch of our Government, concerning which it is important to briefly comment.

The next clause of Article I, Section 8, of the Constitution of the United States vests in Congress the power to establish a uniform rule of naturalization and uniform laws on the sub-

ject of bankruptcies throughout the United States. It is of the deepest interest to the whole Union to know who are entitled to enjoy the rights of citizens in each State, since they thereby, in effect, become entitled to the rights of citizens in all the States. It follows from the very nature of the power that to be useful it must be exclusive. It has been held that a naturalization law which by its terms is made applicable alike to all the States, without distinction or discrimination, is not unconstitutional merely because its operations may be wholly different in one State from another.

Bankruptcy Laws.

As stated in *The Federalist*, "the power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce and will prevent so many frauds, where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn in question." One of the first duties of legislation, while it provides amply for the sacred obligation of contracts and the remedies to enforce them, is to relieve the unfortunate and meritorious debtor from a slavery of mind and body which cuts him off from a fair enjoyment of the common benefits of society, and robs his family of the fruits of his labor and the benefits of his paternal superintendence. A national government which did not possess this power of legislation would be little worthy of the exalted functions of guarding the happiness and supporting the rights of a free people. The law at present in force upon the subject of bankruptcy is the act of July 28, 1898, and supplements, which has heretofore been considered. It should be borne in mind that the States have authority to pass bankrupt laws provided they do not impair the obligation of contracts, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such laws. But an act of a State Legislature which discharges a debtor from all liability for debts contracted previously to his discharge, on his surrendering his property for the benefit of his creditors, is invalid, so far as it attempts to discharge the contract.

The next clause of the Constitution vests in Congress the power "to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures," anent which a few remarks may profitably be made.

The grounds upon which the general power to coin money

and regulate the value of foreign and domestic coin is granted to the National Government cannot require much illustration in order to vindicate it. Money is the universal medium or common standard by a comparison with which the value of all merchandise may be ascertained and the power to coin it is one of the ordinary prerogatives of sovereignty.

The Legal Tender Acts.

After the breaking out of the Civil War in 1861, it was deemed necessary by Congress, in order to supply the means of carrying on the war, to issue a large amount of treasury notes, and to make them a legal tender in payment of private debts, and also of all public dues except duties on imports and interest on the public debt. These notes thereupon to a large extent became the circulating medium of the country, and gold and silver ceased to be used in ordinary traffic except on the Pacific slope. The constitutional validity of the Legal Tender acts of Congress was strongly contested, especially in their application to pre-existing debts, but it was generally sustained by the State courts. The question did not come before the Supreme Court of the United States for decision until the case of *Hepburn vs. Griswold*, decided in December, 1869. In that case a majority of the Court held that the acts were valid so far as they applied to debts contracted subsequently to their passage, but that they were, as to debts contracted before their passage, unwarranted by the Constitution. A year later, however, this decision was overruled, and the acts were sustained, as well as to their application to pre-existing debts as to those subsequently contracted. In the Legal Tender cases the power of Congress to make paper money a legal tender for times of peace as well as war was upheld.

The powers vested in Congress by the succeeding clauses of Article I, Section 8, of the Federal Constitution are well understood and require but passing comment. Besides those specifically mentioned, Congress is empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department, or officer thereof." This does not mean absolutely necessary, nor does it imply the use of only the most direct and simple means calculated to produce the end. But it requires that the means used in the exercise of an expressed

power should be appropriate to the end. Therefore, Congress has power to charter the Bank of the United States, as a necessary and useful instrument of the fiscal operations of the Government. So also it has power under this general authority to provide for the punishment of any offenses which interfere with, obstruct or prevent commerce and navigation with foreign States, and among the several States, although such offenses may be done on land. Few powers of the Government were at the time of the adoption of the Constitution assailed with more severe invective and more declamatory intemperance than the power under discussion. It cannot be denied that the powers given by the Constitution imply the ordinary means of execution, for without the substance of the power the Constitution would be a dead letter. However, this power was inserted as a precaution and to emphasize the fact that Congress shall have all the incidental and instrumental powers necessary and proper to carry into execution all the expressed powers. Upon the whole, as stated by Chief Justice Story, "The result of the most careful examination of this clause is that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the Legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the National Government."

Another question which has for a long time agitated the public councils of the nation, is as to the authority of Congress to make roads, canals and other internal improvements. Concerning the right to appropriate money to internal improvements, the subject has already been reviewed in considering the power to lay and collect taxes. The only limitation is that prescribed by the terms of the Constitution—to wit, that the objects shall be the common defense or the general welfare of the Union. The true test is whether the object be of a local character and local use, in which case Congress cannot constitutionally appropriate money for the object, or whether it be of general benefit to the States, in which event it matters not whether the improvement be in one State in point of locality or in several. In fact, Congress may directly undertake and carry on a system of internal improvements for the general welfare, whenever such improvements fall within the scope of any of the enumerated powers. Thus, Congress may authorize the construction of light-houses, piers, buoys and beacons for the purposes of navigation. As incidental to the power to lay and collect taxes, Congress may authorize the purchase and building of custom houses,

revenue cutters and public warehouses. As incidental to the power to make war, Congress may erect forts, arsenals, dock yards, navy yards and magazines.

A very practical question has been raised: How far Congress can make a law giving the United States a preference and priority of payment of their debts, in cases of the death, insolvency or bankruptcy of their debtors, out of their estates. The Supreme Court has decided upon deliberate argument that Congress possessed such a constitutional power. It is a necessary and proper power to carry into effect the other powers of the Government. In the language of the court, "The Government is to pay the debts of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It may purchase and remit bills for this object, and pass all laws to render effectual the collection of its debts."

It is under the same implied authority that the United States have any right even to sue in their own courts, for an express power is nowhere given in the Constitution. Congress may not only authorize suits to be brought in the name of the United States, but in the name of any artificial person, such as the Postmaster General. The right of making contracts and instituting suits is an incident to the general right of sovereignty. The United States, being a body politic, may within the sphere of the constitutional powers confided to them and through the instrumentality of the proper department to which those powers are confided enter into contracts not prohibited by law and appropriate money to the just exercise of those powers.

Section 9, of Article I, affords an important protection to every citizen in the country, to wit, "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." The President of the United States has no power to suspend the privilege of the writ of *habeas corpus* without an act of Congress to authorize it. The effect of a suspension of the privilege of this writ is to confer on the Executive the power immemorially exercised by the British Crown before the passage of the famous *habeas corpus* act—namely, the power to arrest by warrant for treason or suspicion of treason without specially expressing the nature of the treasonable acts charged, and to imprison the party so arrested on such warrant for an indefinite period without bail or trial. In the exercise of such a power there must be a warrant, and it must be for treasonable practices. The power of suspending the writ of *habeas cor-*

pus is inconsistent with the existence of a free government and is against the spirit of the Constitution and of all the foundations upon which it is erected.

Ex Post Facto Laws.

A protection to individual liberty of equal importance to the foregoing is provided by the same section of Article I, Section 9, which declares that "no bill of attainder or *ex post facto* law shall be passed." *Ex post facto* laws are such as create or aggravate a crime or increase the punishment or change the rules of evidence for the purpose of conviction. The phrase only applies to penal and criminal laws, which inflict forfeitures of punishments, and not to civil proceedings which affect private rights retrospectively. It is a well known principle of law that where no other time is fixed for the operation of a penal statute it takes effect from the time of its passage, and ignorance of the existence of such act forms no legal excuse for a violation of it. In other words, the Constitution aims to protect the individual from punishment for a crime committed before the passage of an act which theretofore was not provided against.

Prohibitions upon States.

Certain restrictions upon the authority of the States are specifically imposed by the tenth section of the first article, which we shall next proceed to investigate. Some of these, and especially those in regard to the power of taxation and the regulation of commerce, will be omitted here for the reason that they have been considered previously. The others will be examined briefly in the order of the text of the Constitution.

The first clause provides that "no State shall enter into any treaty, alliance or confederation; grant letters of marque or reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

The only one of these restrictions requiring special comment is that regarding the impairment of the obligation of contracts, which concerns every business man. There is perhaps not a single clause of the Constitution which has given rise to more controversy than this clause. The provision has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may

be asserted in a court of justice. A private charter is such a contract. An appointment to a salaried office, however, is not a contract within the meaning of the Constitution. All contracts are subject to the rights of eminent domain existing in the several States, and the exercise of this power does not conflict with the Constitution. Nor does the exercise of the power of taxation. It has been held in construing this clause that its spirit is not violated by the passage by a State of Statutes of Limitation, exemption laws, insolvent laws discharging the person of a debtor from imprisonment, or recording acts postponing an elder to a younger title after a limited period. Whatever belongs merely to remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; but if that effect be produced it is immaterial whether it be done by acting on the remedy or directly on the contract itself. The extent of the change is immaterial, any postponement or acceleration of the performance of the contract impairing its obligation.

This prohibition would, if strictly construed, include under the word "law" only statutes enacted by State Legislatures, but it has been determined that the word "law" comprehends, in addition to acts of legislation, State Constitutions and constitutional amendments, together with the judicial decisions of State Courts of last resort, rendered subsequently to the making of the contract in question and antecedently to the suit in which the Court determined the invalidity of the contract. To understand the meaning of this clause, we must have a clear conception of what is meant by the obligation of a contract. It seems agreed that when the obligation of contract is spoken of in the Constitution, we are to understand not the mere moral, but the legal obligation of contracts, and in this connection it is important to distinguish between what is a mere breach of contract and what constitutes an impairment of the obligation thereof. The moral obligation of contracts is, so far as human society is concerned, of an imperfect kind, which the parties are left free to obey or not, as they please. No human lawgiver can either impair or reach it. The Constitution has not in contemplation any such obligations, but such only as might be impaired by a State. It is the civil obligation of contracts which this clause is designed to cover. The civil obligation of a contract may be defined as the duty of performance which the law imposes on one or other, or both, of the parties to the contract. In the language of Chief Justice Marshall, "Any law which releases a

part of this obligation must in the literal sense of the word impair it."

A State cannot take away by statute all or a substantial part of the power for the enforcement of a contract. Consequently it cannot forbid its courts to entertain jurisdiction of a suit to enforce or obtain damages for the breach of a class of contracts legally valid when made. Nor can a State after the making of a contract change to the prejudice of either party the measure of damages for its breach.

It is unconstitutional for a State to materially increase the debtor's exemption after a judgment has been entered. Furthermore, a State cannot, after the making of a mortgage, enlarge the period of time allowed for the redemption after foreclosure, nor take away the right to compound interest, if given by the law existing at the time of the making of the contract.

Whether a State Legislature has authority to pass a law declaring a marriage void, or to award divorce, has been made a question upon which the authorities are somewhat conflicting. Marriage, though it be a civil institution, is understood to constitute a solemn, obligatory contract between the parties, and it has been denied that a State Legislature constitutionally possesses authority to dissolve that contract against the will and without the default of either party. Some courts have insisted that the granting of a divorce was a judicial power, and consequently could not be exercised by the Legislature. The better authority, however, holds that marriage is a civil contract, and that the Legislature of a State may regulate the remedy for this breach.

Contracts for the payment of money being within the protection of the constitutional prohibition of the impairment of their obligation, judgments upon such contracts are equally entitled to protection. Therefore, a judgment against a municipal corporation founded upon a breach of contract is not affected by a subsequent legislative abolition of the municipality's power to levy taxes for the payment of its debts. But the rights of a judgment creditor are not impaired by a State statute reducing the rate of interest thereafter to accrue upon existing judgments; nor are judgments founded upon torts, contracts whose obligations will be protected against subsequent legislation.

In concluding our discussion of this clause, the force and effect of the prohibition as construed by the Supreme Court of the United States may be summarized as follows: A State may not by any law or by any act to which the State by its enforcement thereof gives the force of a law, deprive a party of the

legal right of enforcing, or obtaining compensation for the breach of an express contract, executed or executory, between individuals, or between a State and individuals, but a State may regulate or limit the remedies of the contracting parties, provided that it leaves in force a substantial part of the legal remedies which subsisted at the time the contract was made.

It seems to be the general opinion that since the American Revolution no State government can be presumed to possess the transcendental sovereignty to take away vested rights of property. No government would be deemed to be free where the rights of property are left solely dependent upon a legislative body without any restraint. The rights of personal liberty and private property should be held sacred and a State Legislature is forbidden by the Federal Constitution to violate or disregard them.

The Constitution of the United States was not framed to meet only the exigencies of the period of its formation, nor does it purport to a code which with minute detail prescribes all that may be done, and all that may not be done by Congress in the execution of the powers specifically granted. As Daniel Webster said in one of his famous arguments, and as repeated by Chief Justice Marshall: "The Constitution enumerates but does not define the powers which it grants, nor does it prescribe the means which may rightfully be used in executing those powers and without whose use the grant of the powers would be nugatory."

Article I, Section 8, of the Constitution, declares that "the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." The question arises—How is it to be determined what laws are necessary and proper? If Congress can so determine, obviously every act of Congress must be regarded as constitutional. If the final determination of this question is to be made by a Court, what principles are to guide the Judges in reaching a conclusion? The answer to this question, as found in the best authorities, is as follows. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional."

By virtue of the implied powers, it has been held that Congress may enact statutes creating banking corporations as fiscal

aids to the Government; regulating the carriage of the mails and determining what may be transported and what must be excluded from the mails; exercising the right of eminent domain with regard to land within the bounds of a State and held in private ownership; providing for the exclusion or expulsion of aliens from the limits of the United States. The Government of the United States is one of enumerated powers, the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national Government assumes to possess. In this respect it differs from the Constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess. It was no uncommon occurrence in early days for the individual States to claim the right to interpret the Federal Constitution for themselves individually, and in their aggregate capacity, independent of Federal authority. But it is now an established principle that in all cases involving a construction of the Federal Constitution, the courts of the United States have exclusive jurisdiction and their decisions are binding upon the State courts. The courts of the several States are as much bound to uphold the supremacy of the Federal Constitution as are the Federal courts.

Judicial Interpretation.

From force of circumstances and conditions necessarily arising in the administration of the affairs of the Government, it is evident that those who are charged with official duties, whether executive, legislative or judicial, must necessarily construe the Constitution and laws in numerous instances. Every department of the Government invested with constitutional powers must, in the first instance, be the judge of its powers or it could not act; and this practical construction by persons or departments outside of the judiciary may or may not be final, according to the circumstances and nature of each particular case. That is to say, whenever a constitutional provision or statute gives a discretionary power to be exercised when and under such circumstances as those who are charged with exercising such power may deem expedient, the construction given to all such provisions or statutes by those charged with such duties is conclusive and not subject to review by the judicial power, even though erroneous.

Whenever a statute gives a discretionary power to any per-

son to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.

As all constitutional questions cannot receive judicial interpretation, it follows that only in cases where some right, public or private, is involved, which results in litigation and is not included in that class of cases which are addressed to the discretion of the other departments, questions requiring construction of constitutional provisions, can be brought to the attention of the judiciary, and judicial construction of such provisions or statutes obtained in the course of judicial administration, and when this is done the law as declared in the judgment rendered must be taken as the authoritative rule within the jurisdiction in which it is announced, until reversed, overruled or changed by constitutional amendment or legislation.

In construing the Constitution the purpose is to give effect to the intent of the framers and of the people who have adopted it, and it is a rule of construction that the Constitution is to be construed so as to promote the objects for which it was framed and adopted; and to accomplish this result the extremes of both a liberal and a strict construction are to be avoided and technical rules are to be excluded.

Another well-recognized rule of construction is that in interpreting the Constitution, the whole instrument is to be examined with a view of ascertaining the meaning of each and every part. The presumption and legal intendment is that each and every clause in a written constitution has been inserted for some useful purpose, and, therefore, the instrument must be construed as a whole, in order that its intent and general purposes may be ascertained; and as a necessary result of this rule it follows that wherever it is possible to do so each provision must be construed so that it shall harmonize with all others, without distorting the meaning of any of such provisions, to the end that the intent of the framers may be ascertained and carried out and effect given to the instrument as a whole.

The Constitution has been construed to operate prospectively, unless from the language used or the objects to be accomplished it is clearly shown that some provision was intended to operate retrospectively. The construction given must always be uniform, so that the operation of the instrument will be inflexible, operating at all times alike and in the same manner with reference to the same subjects.

As it would not be practicable, even if possible, in a written

constitution to specify in detail all of its objects and purposes or the means by which they are to be carried into effect, constitutional powers are often granted or restrained in general terms from which implied powers and restraints necessarily arise. It is an established rule of construction, very important to bear in mind, that where the Constitution confers a power or enjoins a duty, it also confers by implication all powers that are necessary for the exercise of the one or for the performance of the other.

The progress of our investigation into the Constitution of the United States has now directed us to an inquiry of the organization and powers of the Executive Department of the Government. The most difficult task of any government is to properly outline and limit the powers of the Executive.

Under the Confederation no National Executive was provided for. The whole powers of the National Government were vested in a Congress consisting of a single body, and that body was authorized to appoint a committee of the States, composed of one delegate from every State, to sit in the recess, and to delegate to them such of their own powers, not requiring the consent of nine States, as nine States should consent to. This want of a National Executive was deemed a fatal defect in the Confederation. It is admitted, as a fundamental maxim of government, that the legislative, executive and judicial departments ought to be separate, and the powers of one ought not to be exercised by either of the others. Where one is exercised by the other, a real despotism results.

The framers of the Federal Constitution, recognizing this fact, provided in Article II of the Constitution that "the Executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows" (to be hereinafter considered). Many commentators have held the opinion that the executive power of a government should be vested in two or more persons rather than in a single individual. The history of ancient nations, particularly that of Rome, points out the fact that many mischiefs arose from dissensions between the consuls, and between the military tribunes, who were at times substituted in their stead. It is obvious that a division of the executive power between two or more persons must always tend to produce dissensions. Whenever two or more persons are engaged in any common enterprise or pursuit there is always danger of differ-

ence of opinion. If it be a public trust or office in which they are clothed with equal dignity and authority, there are peculiar dangers arising from personal emulation or animosity; from superior talents on one side, encountering strong jealousies on the other; from pride of opinion on one side and weak devotion to popular prejudices on the other. From these causes the most bitter rivalries and dissensions will occur, which weaken the authority and distract the plans and operations of the executive department, even at the most critical moments. Furthermore, plurality in the executive diminishes the means as well as the power of fixing responsibility of bad measures upon the real authors. For these reasons it was decided to vest the executive power in a single individual, a President.

The Chief Executive.

It has been decided that an act done by one President, vesting a right in a citizen, is not subject to review or reversal by his successor. It has been held, however, that a conditional pardon, granted by one President, may be revoked by his successor, before delivery to the prisoner.

The next clause of Article II points out the manner in which the President is to be chosen. A review of our Presidential elections demonstrates the fact that the President is not, strictly speaking, elected by popular vote. In view of the frequent discussions upon this point, it will be well to inquire into the original scheme embodied in the Constitution, together with the amendment subsequently passed. The Constitution as originally adopted provides that "each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator, or Representative, or person holding an office of trust or profit under the United States shall be appointed an elector.

"The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all persons voted for, and of the number of votes for each, which list they shall sign and certify and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall in the presence of the Senate and House of Representatives open all certificates and the votes shall then be counted.

The person having the greatest number of votes shall be President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President."

The Electoral College.

The principal motive which induced a change of the choice of President from a national Legislature (which was at first contemplated) was to have the sense of the people operate in the choice of the person to whom so important a trust was confided. This would be accomplished better, it was thought, by committing the right of choice to persons selected for that sole purpose, instead of persons selected for the general purposes of legislation. Hence an electoral college was provided for. The President thus chosen by this intermediate body is far more independent than if chosen by a legislative body, to whom he might be expected to make corresponding sacrifices to gratify their wishes or reward their services. It was further thought that, being chosen by the voice of the people, the Executive would turn his gratitude in the natural direction, and sedulously guard the people's rights.

The number of electors is equal to the number of Senators and Representatives of each State, thus giving to each State as virtual representation in the electoral colleges as that which it enjoys in Congress. The votes when given are to be transmitted to the seat of the National Government, and there opened and counted in the presence of both Houses. The person who has the next highest number of votes after the choice of President is to be Vice-President. If none of the candidates for Presi-

dent has the required majority the House of Representatives, being the popular branch of the Government, is to elect from the five highest on the list of the person whom they may deem best qualified for the office, each State being accorded one vote in the choice. In the event of a Vice-President not being chosen as provided for, the Senate is given the right to choose.

It may be observed that in no respect have the enlarged and liberal views of the framers of the Constitution, and the expectations of the public when it was adopted, been so completely frustrated as in the practical operation of the system. It is a notorious fact that the electors are now chosen wholly with reference to particular candidates, and are pledged to vote for them. The candidates for the Presidency are selected and announced in each State long before the election; and an enterprising canvass is maintained in the newspapers, and in party meetings, to secure votes for the favored candidate and to defeat his opponents. So that nothing is left to the electors after their choice but to register votes which are already pledged. As a matter of fact, the exercise of an independent judgment by an elector would be treated as a political usurpation, dishonorable to the individual and a fraud upon his constituents.

In the third Presidential election (in which Thomas Jefferson and Aaron Burr were candidates), the defect in the system above set forth was practically illustrated. Mr. Bayard, of Delaware, by his final vote in favor of Mr. Jefferson, decided the election. It was remarked at the time that in the election of Mr. Jefferson the votes of two or three States were held by persons who soon afterward received office from him. It cannot escape notice that if the House of Representatives is to choose a President the choice is apt to be influenced by many motives independent of his merits and qualifications.

As a result of the election in 1801, the Twelfth Amendment to the Constitution was passed in 1804, and, as this amendment materially changes the mode of electing a President in several respects, we will quote it in full:

The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they

shall sign and certify, and transmit, sealed, to the seat of Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person has such majority, then, from the persons having the highest numbers, not exceeding three (note change from five as in original text), on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as the President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The electors meet in their respective States on the first Wednesday in December following the election, and their returns must be transmitted to the seat of Government before the first Wednesday in the following January. The certificates are opened and counted on the second Wednesday of the succeeding February.

The changes which this amendment effects should be carefully noted. In the first place, it provides that the ballots of the electors shall be separately given for President and Vice-President, instead of one ballot for two persons as President. By this amendment the Senate may proceed to a choice of the Vice-

President immediately on ascertaining the returns of the votes. In the next place, under the original mode if no choice should be made of a President, by the House of Representatives until after the expiration of the term of the preceding officer, there would be no person to perform the functions of the office and interregnum would ensue, causing a total suspension of the powers of government. By virtue of the amendment quoted the new Vice-President would, in such case, act as President. There are several other minor changes, which, however, need not be commented upon here. It might be observed that this amendment has diminished the dignity and importance of the office of Vice-President. Originally he was a competitor for the Presidency. This is no longer the case.

Congress is given the power to determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

The elector is presumed to be entirely at liberty to act according to the dictates of his own judgment when the period arrives for casting his vote; but whatever may be the theory, the fact is otherwise in practice. In 1872 Horace Greeley, one of the candidates for the Presidency, died after the popular election and before the electoral college had convened. Under such circumstances, the electors chosen to vote for him were left at liberty to vote as they pleased, and as they did not constitute a majority, so as to make united action important, they scattered their votes according to personal preferences.

Qualifications.

It is well known that no other than a natural-born citizen who is at least thirty-five years old and who has been fourteen years a resident within the United States is eligible to become President. In case of the death, resignation or inability of the President to discharge the powers and duties of his office, the same shall devolve upon the Vice-President. This has occurred four times within the history of our country. In the event of the death, resignation or inability of the President, and Vice-President, Congress is given authority to declare who shall then act as President, and such officer shall then act accordingly until the disability be removed, or a President elected. The President before entering upon the duties of his office shall take the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United

States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States." This is a suitable pledge by the President of his fidelity and responsibility to his country, and creates upon his conscience a deep sense of duty, by an appeal, at once in the presence of God and man, to the most sacred and solemn sanctions which can operate upon the human mind.

Having considered in whom the executive power is vested under the Constitution, together with the method of selection and his general qualifications, we will direct our attention to a brief inquiry into his general powers and duties, concluding which we will consider the judicial branch of the Government.

The powers and duties vested in the Executive under the Constitution of the United States are set forth in the second and third sections of Article II thereof. The most obvious powers of an Executive are to execute the laws, maintain peace and resist foreign invasion. For these purposes it is provided that "the President shall be commander-in-chief of the army and navy of the United States and of the militia of the several States when called into the actual service of the United States." If a state of war exists, the President, as commander-in-chief, has the authority, without any act of Congress, to exercise all belligerent rights, such, for instance, as to institute a blockade. The President is not obliged to take personally the command of the militia when called into the service of the general Government; but he may place them under the command of officers of the army of the United States, to whom, in his absence, he may delegate the powers vested in him by the Constitution. Any officer of the army may, therefore, be required by orders from the President to perform the appropriate duties of his station in the militia, when in the service of the United States, whenever the public interest shall so require. But this power must be exercised in strict accordance with the right of appointment of militia officers, which is expressly reserved to the States. The rules and orders made and issued by the Secretary of War and of the Navy are to be considered as emanating from the President. The President speaks and acts through the heads of departments in reference to the business committed to them. Congress may, however, impose independent duties upon the head of a department when not repugnant to any rights secured by the Constitution.

The President is further given the power to "require the opinion, in writing, of the principal officer in each of the execu-

tive departments, upon any subjects relating to the duties of their respective offices." The custom was inaugurated in Washington's administration of holding a consultation with the heads of departments, either assembled, or by taking their opinions separately in conversation or in writing. Mr. Jefferson's practice of holding Cabinet meetings for the determination of all important questions of administration has been followed by the later Presidents; but there is no law requiring this, and each President will determine his own course. The Cabinet, as a body of councillors, has no necessary place in our Constitutional system; the President and not the Cabinet, is responsible for all the measures of the Administration, and whatever is done by the head of a department is, in contemplation of law, done by the President through the proper executive agent. This system is directly opposite to that adopted in England. In Great Britain the Cabinet is responsible, for everything done by the King is supposed to be by their advice. In this country the Cabinet is not required to be in accord with Congress or with either House thereof, while in Great Britain they must be in harmony with the House of Commons on all important questions. In Great Britain the members of the Cabinet are entitled to sit in the legislative body, whereas in the United States Cabinet members enjoy no such privilege.

The President is further authorized to "grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Many commentators contend that the power of pardon does not exist under a perfect administration of the laws and that the admission of the power is a tacit acknowledgment of the infirmity of the course of justice. But, as stated by the erudite Story, if this be a defect at all, it arises from the infirmity of human nature generally. No one will contend that any system of laws can provide for every possible shade of guilt a proportionate degree of punishment. The total exclusion of all power of pardon would necessarily introduce a very dangerous power in Judges and juries in following the spirit rather than the letter of the laws. There are not only various gradations of guilt in the commission of the same crime, which are not susceptible of any previous enumeration and definition, but the proofs must in many cases be imperfect, particularly as to the aggravating or mitigating circumstances. The power of pardon is indispensable in order to correct evils and mistakes subsequently discovered. A sense of responsibility being strongest in proportion as it is undivided, the prerogative of

pardon has consequently been vested exclusively in the Executive. The President, it has been held, may pardon as well before trial and conviction as afterward. He may also pardon after the expiration of the imprisonment, which forms part of the sentence, and he may remit a fine after the death of the offender. He may grant a conditional pardon provided the condition be compatible with the genius of our Constitution and laws. Where the condition is such that the Government has no power to carry it into effect, the pardon will be in effect unconditional. It should be borne in mind that a conditional pardon is not complete until delivery. It has likewise been held that the pardoning power includes that of remitting fines, penalties and forfeitures under the revenue laws; fines imposed on defaulting jurors and fines for contempt of Court and in criminal cases in general. The President has no power, however, to remit the forfeiture of a bail bond. Nor can he, by a pardon, defeat a legal interest or right which has become vested in a private citizen, as, for example, the vested right of an officer making a seizure. The Supreme Court has decided that the effect of a pardon cannot be restricted by subsequent legislation. The grant of the pardoning power neither requires nor authorizes the President to re-examine the case upon new facts, nor to grant a pardon upon the assumption of the new facts alleged. A pardon is a private though official act and must be delivered to and accepted by the criminal. The President alone can pardon offenses committed in a territory, in violation of the acts of Congress.

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is free, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.

Treaty-Making Power.

The power to make treaties which is vested in the Executive by the following clause of Section 2 is a very important one and embraces all sorts of treaties, for peace or war, for commerce or territory, for indemnity for injuries or payment of debts, for the recognition and enforcement of principles of public law, and for any other purposes which the policy or interests of this country may dictate in its intercourse with other nations. Under the Confederation the treaty-making power was vested solely in Congress. Experience demonstrated the

defects of this plan, and consequently the framers of the Constitution vested this power in the President. The qualification imposed upon the exercise of this power is that treaties be made "by and with the advice and consent of the Senate," and it is further necessary that two-thirds of the Senators present concur. Considering the delicacy and extent of the power, it is too much to expect that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties. Therefore, while the Constitution confides the treaty-making power to the executive department, it guards it from serious abuse by placing it under the ultimate superintendence of a select body of high character and high responsibility, the Senate. The President is the immediate author and finisher of all treaties, but no treaty becomes binding upon a country unless it receives the deliberate assent of two-thirds of the Senate.

Continuing, the Constitution provides that he (the President) "shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

In construing these powers the Supreme Court has held that the nomination and appointment to an office are voluntary acts and distinct from the commissioning of such appointee. As a matter of fact, even after confirmation of an appointment by the Senate, the President may in his discretion withhold a commission; until a commission has been signed the appointment is not fully consummated. The Senate cannot originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nominations, and such nominations fall whenever it disagrees to them. The power of the President to appoint to office necessarily includes the power to remove all officers appointed and commissioned by him, where the Constitution has not otherwise provided. Therefore he may remove a Territorial Judge in his discretion.

The President is required to fill vacancies happening during the recess of the Senate by granting commissions which shall expire at the end of their next session.

Judicial Power.

The third article of the Constitution embraces the organization and powers of the Judicial Department. The Judicial power is "vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." The want of this power constituted one of the vital defects of the Articles of Confederation. Unless the Government is provided with a Judicial Department with powers co-extensive with those of the Legislative Department, it must naturally be unsafe. As Montesquieu remarks, "there is no liberty, if the Judiciary Power be not separated from the Legislative and Executive Powers." It cannot be doubted that personal security and private property rest entirely upon the wisdom, the stability and the integrity of the Courts of Justice. In a Government such as ours, where there is an assemblage of republics combined under a common head, the necessity of some controlling judicial power to ascertain and enforce the power of the Union is apparent.

The jurisdiction of the courts of the United States depends exclusively on the Constitution and laws of the United States. The Judiciary must decide upon the constitutionality of the acts and laws of the Federal and State Governments. Congress, having the power to establish inferior courts, as a necessary consequence has the right to define their respective jurisdiction. With the exception of the creation of the Supreme Court, the power of Congress to create inferior courts and to confer upon them as much or as little jurisdiction pertaining to the Federal Government as it thinks best is unlimited.

Section 1 of Article III further provides that "the Judges both of the Supreme and Inferior Courts, shall hold their offices during good behavior; and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office."

The Justices of the Supreme Court are expressly required to be appointed by the President, by and with the advice and consent of the Senate, as has been pointed out heretofore.

The Judicial Power is specifically outlined in Section 2 of Article III to "extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting Ambassadors, other public Ministers and Consuls, to all cases of admiralty and maritime jurisdiction; to controversies

to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects."

Federal Jurisdiction.

A "case" arises, within the meaning of the Constitution whenever any question respecting the Constitution, laws or treaties of the United States has assumed such a form that the judicial power is capable of acting on it. By cases in law are to be understood suits in which legal rights are to be ascertained and determined in contradistinction to those where equitable rights alone are recognized, and equitable remedies administered. By cases in equity are to be understood suits in which relief was sought according to the principles and practice of the equity jurisdiction as established in English jurisprudence. The Federal courts have jurisdiction of all suits affecting public ministers, and the recognition of the Executive of the United States is conclusive as to the public character of the party.

The jurisdiction of the Admiralty Courts in this country at the time of the Revolution, and for a century before, was more extensive than that of the High Court of Admiralty in England. It is not limited to the particular subject over which it was exercised in the English Courts of Admiralty when the Federal Constitution was adopted; neither does it extend, under the Constitution and laws of Congress, to all cases which would fall within its cognizance, according to the civil law, and the practice and usages of Continental Europe. The Supreme Court has decided that the admiralty jurisdiction of the United States extends to the navigable lakes and rivers, without regard to the ebb and flow of the tide of the ocean. It embraces all maritime contracts wheresoever the same may be made or executed and whatever may be the form of the stipulation; and also all torts and injuries committed upon waters within the jurisdiction of the United States.

Among the enumerated powers of the judiciary is that relating to controversies to which the United States shall be a party. Congress never having authorized suits to be brought against the United States, no such action can be commenced or prosecuted. This does not prevent the exercise of appellate jurisdiction, to

obtain by writ of error a reversal of judgment which has been rendered in favor of the United States. Nor does it preclude individuals, when sued by the United States, from availing themselves of credits or set-offs against the United States. Claims against the Government are prosecuted through the Court of Claims. As stated in *The Federalist*, "it is a known maxim, justified by the general sense and practice of mankind, and recognized in the law of nations, that it is inherent in the nature of sovereignty not to be amenable to the suit of any private person without its own consent." The citizens of the United States are not wholly destitute of remedy, in case the National Government should invade their rights, either by private injustice and injuries or by public oppression. In case the latter occurs the whole structure of the Government is so organized as to afford redress by enabling the people to remove public officers who abuse their trust. Concerning private injustice and injuries the National Government is *per se* incapable of any personal wrong, such as assault and battery. Regarding injury to property, the remedy for such lies against the immediate wrongdoer, who may be sued, and who cannot shelter himself under any immunity of the Government from responsibility. Consequently, if any agent of the Government shall unjustly invade the property of a citizen under color of a public authority, he must, the same as any other violator of the laws, respond in damages. Of the remaining controversies, over which the judiciary of the United States has control, little need be said. Citizenship when spoken of in the Constitution in reference to the jurisdiction of the Federal courts, means nothing more than residence. A corporation created by and transacting business in a State is to be deemed an inhabitant of the State, capable of being treated as a citizen, for all purposes of suing and being sued. The Judiciary act confines Federal jurisdiction, on the ground of citizenship, to cases where the suit is between a citizen of a State where the suit is brought, and the citizen of another State; a mere declaration of intention to become a citizen, under the naturalization laws, is not sufficient to prevent an alien from being regarded as a foreign subject, within the meaning of the Constitution.

Having concluded our brief review of the classes of cases to which the judicial power of the United States extends, the next inquiry presented is in what mode it is to be exercised and in what courts it is to be vested, the answer to which is contained in the succeeding clause of the Constitution; to wit: "In all cases affecting Ambassadors, other public Ministers and Consuls, and

those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It is to be observed that by the above clause the original jurisdiction of the Supreme Court is very limited, and Congress cannot constitutionally confer on it any other or further original jurisdiction.

Trial by Jury.

An important safeguard to personal liberty is afforded by the provisions in the next clause of the Constitution, to the effect that all crimes shall be triable by a jury except in cases of impeachment. A trial by jury is generally understood to mean *ex vi termini*—a trial by a jury of twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites may be considered unconstitutional. Such trial must be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as Congress may by law direct. The great object of trial by jury in criminal cases is to guard against a spirit of oppression on the part of rulers and a spirit of violence on the part of the people. This right constitutes one of the fundamental articles of Magna Charta, in which it is declared that no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, liberty or property, but by the judgment of his peers or by the law of the land. The judgment of his peers here alluded to, and commonly called in the quaint language of former times a trial *per pais* or trial by the country, is the trial by jury, who are called the peers of the party accused, being of the like condition and equality in the State. When our ancestors came to America they brought this great privilege with them. It is now incorporated into all our State constitutions as a fundamental right, and, in the language of the Supreme Court, "the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms."

Treason.

Treason is regarded as the highest crime in civil society, since its aim is an overthrow of the government. Its tendency is to produce the greatest public alarm, and on this account it is peculiarly odious. It is, therefore, important to clearly understand what treason consists of, and in view of the history of England in dealing with treasons, actual and constructive, the framers of the Constitution determined to interpose an impassable barrier against arbitrary constructions either by the courts or by Congress, upon this crime. By the third section of Article III, treason is defined as follows: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

It has been held that a conspiracy to subvert the Government by force is not treason. There must be an actual levying of war. An enlistment of men, who are not assembled, is not a levying of war within the meaning of the clause in question. In the famous trial of Aaron Burr it was held that no man can be convicted of treason who was not present when the war was levied. Congress is given the power under the Constitution to declare the punishment of treason, but no attainder of treason will work corruption of blood or forfeiture except during the life of the person attainted. The crime being of so serious a nature, it must be proven by two witnesses or a confession in open court.

The Fourth Article.

This concludes our inquiry into the organization and powers of the legislative, executive and judicial departments of our Government. The remaining four articles of the Constitution, together with the amendments are none the less important and consequently a brief investigation of the construction placed upon their terms will be instructive.

Article IV provides that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. A judgment of a State Court has the same credit, validity and effect, in every other Court within the United States, which it had in the State where it was rendered. Such judgments, so far as the Court rendering them had jurisdiction, are to have in all courts full faith and credit. They have not, however, full power and conclusive effect, but only

such effect as they possessed in the State whence they were taken. Any State law which destroys the right of a party to enforce a judgment regularly obtained in another State is unconstitutional.

Section 2 of Article IV provides that the "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It is obvious that if the citizens of each State were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as other aliens. The intention of this clause was to confer on them, if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances. What do we mean by the privileges and immunities of citizens of the several States? It would be more tedious than difficult to enumerate all, but they may be comprehended under the following general heads: Protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole; the right of a citizen of one State to pass through or to reside in any other State, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of every kind in the courts of the State; to take hold and dispose of property, either real or personal, and an exemption from higher taxes or imposition than are paid by citizens of the other State. These and many others which may be mentioned are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union. It should be borne in mind that provision does not apply to corporations. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as the clause under consideration.

We were discussing the constitutional provision that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. A citizen of the United States, residing in any State of the Union, is a citizen of that State. He is entitled to all the privileges of a citizen of that State, but does not carry with him any rights enjoyed under the laws of another State. It has been decided by our Federal courts that this clause

has nothing to do with distinctions founded on domicile; such a person has the same right under the State laws which a native-born citizen domiciled elsewhere would have and no other rights. But since the adoption of the Fourteenth Amendment, one born or naturalized in the United States and subject to its jurisdiction is, without reference to State Constitutions or laws, entitled to all the privileges and immunities secured by the Constitution to its citizens. Nevertheless a State law prohibiting marriage between negroes and white persons is not unconstitutional.

Fugitives.

To facilitate the administration of justice in the several States of the Union the succeeding two clauses of the Constitution were enacted, providing: "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed from the State having jurisdiction of the crime. No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor but shall be delivered up, on claim of the party to whom such service or labor may be due."

It has been often made a question, says Story in his "Commentaries," how far any nation is by the law of nations, and independent of any treaty stipulations, bound to surrender upon demand fugitives from justice, who, having committed crime in another country, have fled thither for shelter. Mr. Chancellor Kent considers it clear upon principle, as well as authority, that every State is bound to deny an asylum to criminals and, upon application and due examination of the case, to surrender the fugitive to the foreign State where the crime has been committed. It is now settled that nations can only claim from each other the surrender of fugitives under treaty stipulations. Regardless of the international law on the subject it cannot be questioned that it is of vital importance to the public administration of criminal justice, and the security of the respective States, that criminals who have committed crimes therein should not find an asylum in other States, but should be surrendered up for trial and punishment. It discourages crimes, cuts off the chances from escape from punishment and promotes harmony and good feeling among the States. A fugitive from justice may be arrested and detained until a formal requisition can be made by the proper authority.

The alleged crime must have been committed in the State from which the party is claimed to be a fugitive and he must be actually a fugitive from that State. It is not necessary that the crime charged should constitute an offense at the common law. It is enough that it is a crime against the laws of the State from which the fugitive fled.

The next clause above quoted was introduced into the Constitution solely for the benefit of the slave-holding States, to enable them to reclaim their fugitive slaves who escaped into other States where slavery was not tolerated. As slavery no longer exists it is not necessary to comment on this provision, but it is important to bear in mind that this clause includes apprentices.

Admission of New States.

The third section of Article IV regulates the manner in which new States shall be admitted into the Union and Territories governed to the following effect: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, nor parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property, belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." The people of any Territory may peaceably meet together in primary assemblies, or in conventions chosen for such assemblies, for the purpose of petitioning Congress to abrogate the territorial government, and to admit them into the Union as an independent State, and if they accompany their petition with a Constitution framed and agreed on by their primary assemblies, or by a convention of delegates chosen by such assemblies, there is no objection to their power to do so, nor to any measures which may be taken to collect the sense of the people in respect to it; provided such measures be prosecuted in a peaceable manner, in subordination to the existing government, and in subserviency to the power of Congress to adopt, reject or disregard them at their pleasure.

The Supreme Court has decided that the power of Congress to dispose of the public lands is not limited to making sales, but

they may be leased. No property, however, belonging to the United States can be disposed of except by the authority of an act of Congress. The United States, under the present Constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which, at the time, has not a population that fits it to become a State, and may govern it as a territory, until it has a population which, in the judgment of Congress, entitles it to be admitted as a State of the Union. During the time it remains a territory Congress may legislate over it, within the scope of its constitutional powers in relation to citizens of the United States. The territory thus acquired is acquired by the people of the United States, for their common and equal benefit.

Republican Form of Government Guaranteed.

The fourth section of Article IV provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature or of the Executive (when the Legislature cannot be convened), against domestic violence. Without a guarantee the assistance to be derived from the National Government, in repelling domestic danger which might threaten the existence of the State Constitution, could not be demanded as a right from the National Government. The *Federalist*, in commenting upon this important clause, says: "Governments of dissimilar principles and forms have been found less adapted to a Federal coalition of any sort than those of a kindred nature." By virtue of this clause a State cannot exchange a republican for an anti-republican constitution, and before a State can be admitted into the Union it must submit a constitution in conformity with the principles of a republican form of government. Protection against domestic violence is added with equal propriety. Every pretext for intermeddling with the domestic concerns of any State, under color of protecting it against domestic violence, is taken away by that part of the provision which renders an application from the Legislature or executive authority of the State endangered necessary to be made to the general Government before its interference can be at all proper. This clause, however, becomes an immense acquisition of strength and additional force to the aid of any State government in case of an internal rebellion or insurrection against lawful authority.

Amendments.

Article V of the Constitution determines the mode in which amendments thereto may be made. "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment, which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate." It is obvious that no human government can ever be perfect; and that it is impossible to foresee or guard against all the exigencies which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people. Two methods of effecting amendments are provided for, to wit: One at the instance of the Government itself, through the instrumentality of Congress; the other at the instance of the States, through the instrumentality of a convention. Twelve of the amendments adopted were proposed by Congress, the balance by the second method. Ample time for deliberation, both in proposing and ratifying amendments, is given, and the system has proven very successful in operation.

The most important provisions of Article VI are, first, that the Constitution and laws of the United States shall be the supreme law of the land; and, second, that no religious test shall ever be required as a qualification to any office or public trust under the United States. A law by the very meaning of the term includes supremacy, and if individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. The clause mentioned only declares a truth which flows immediately and necessarily from the institution of a national government.

The restriction against any religious test as a qualification to office needs no comment. The religious history of England and other continental countries convinced the framers of our Constitution of the dangers of any alliance between church and State, and this clause was consequently inserted.

The seventh and last article of the Constitution provides that nine States must ratify the Constitution to make same effective.

Amendments to the Constitution.

Fifteen amendments to the Constitution have been made since its adoption. The first ten amendments were proposed by Congress at their first session in 1789. The eleventh was proposed in 1794; the twelfth in 1803; the thirteenth in 1865; the fourteenth in 1866, and the fifteenth in 1869.

The most general objection urged against the Constitution was that it did not contain a full Bill of Rights. A Bill of Rights has been defined as a freeman's title to protection, and constitutes a limitation upon the powers of government. Let us, therefore, enter upon a brief consideration of the amendments regarding subjects properly belonging to a Bill of Rights.

The first amendment and perhaps the most important provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

The Constitution makes no provision for protecting the citizens of the respective States in their religious liberty; that is left to the State Constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States. The First Amendment deprived Congress of all legislative power over men's religious opinion; but left it free to reach practices which are in violation of social duties or subversive of good order; it may therefore prohibit polygamy in the Territories though the practice of it is alleged to be sanctioned by the religion of the inhabitants.

The next most important amendment was the Third, providing that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty and private property.

The Fifth Amendment protects every citizen of the United States from being twice put in jeopardy of life or limb for the same offense, from being a witness in any criminal case against

himself, and from being deprived of his life, liberty or property without due process of law. This amendment also provides that no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury.

In all criminal prosecutions, under the provisions of the Sixth Amendment to the Constitution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, "and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the Court to compel the attendance of his witnesses.

The right of trial by jury is preserved by the Seventh Amendment in all controversies where the amount involved shall exceed twenty dollars in value. By the terms of the Eighth Amendment excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. The Ninth Amendment reserves to the people all rights not specifically vested in the United States under the Constitution.

The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." The Twelfth Amendment regarding the election of the Executive has already been considered.

The Thirteenth, Fourteenth and Fifteenth Amendments were made necessary by the complications arising out of civil war troubles. These amendments abolish slavery, define citizenship, apportion Representatives, define disqualification for office and extend the right of suffrage to all citizens regardless of color or previous condition of servitude.

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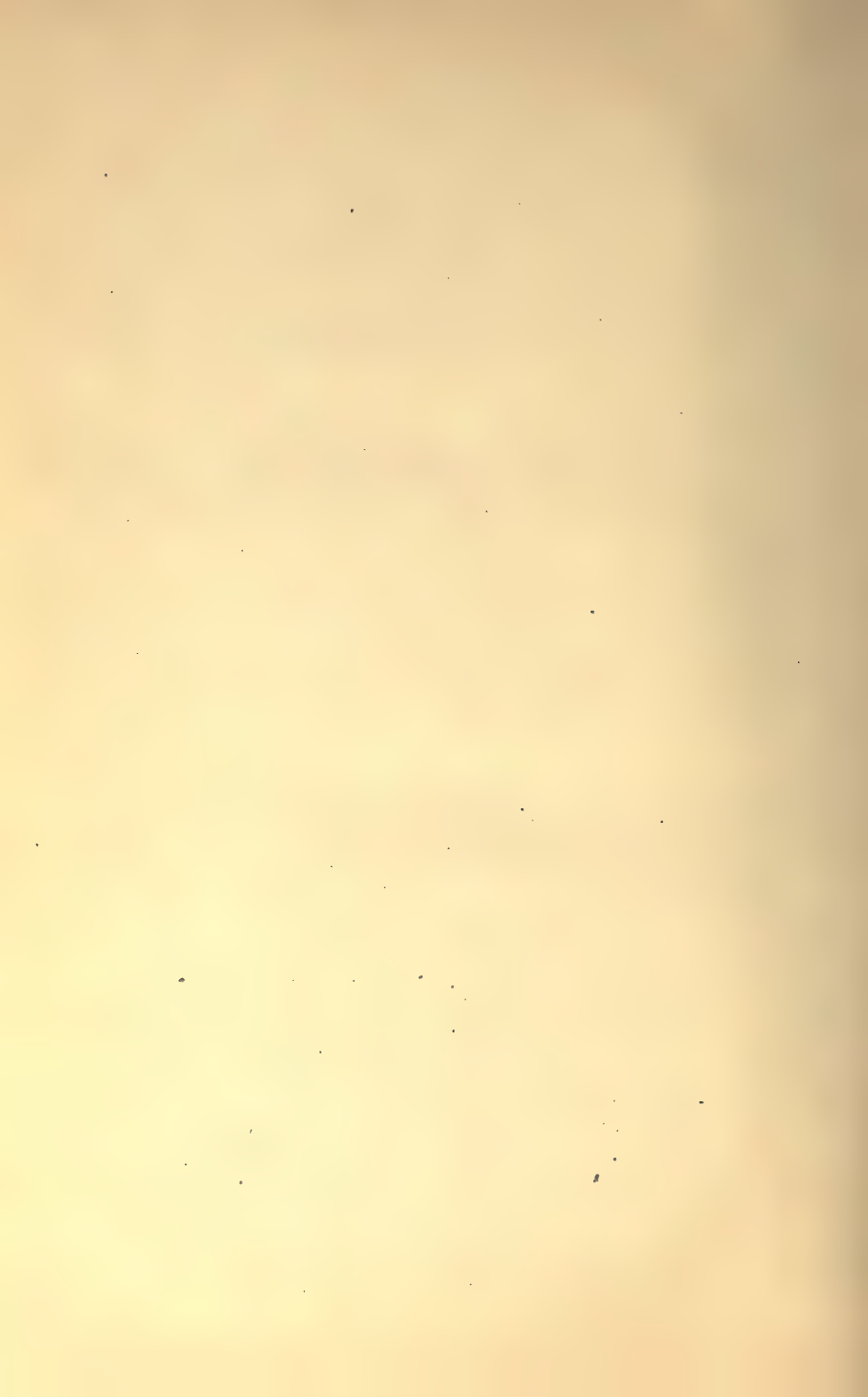
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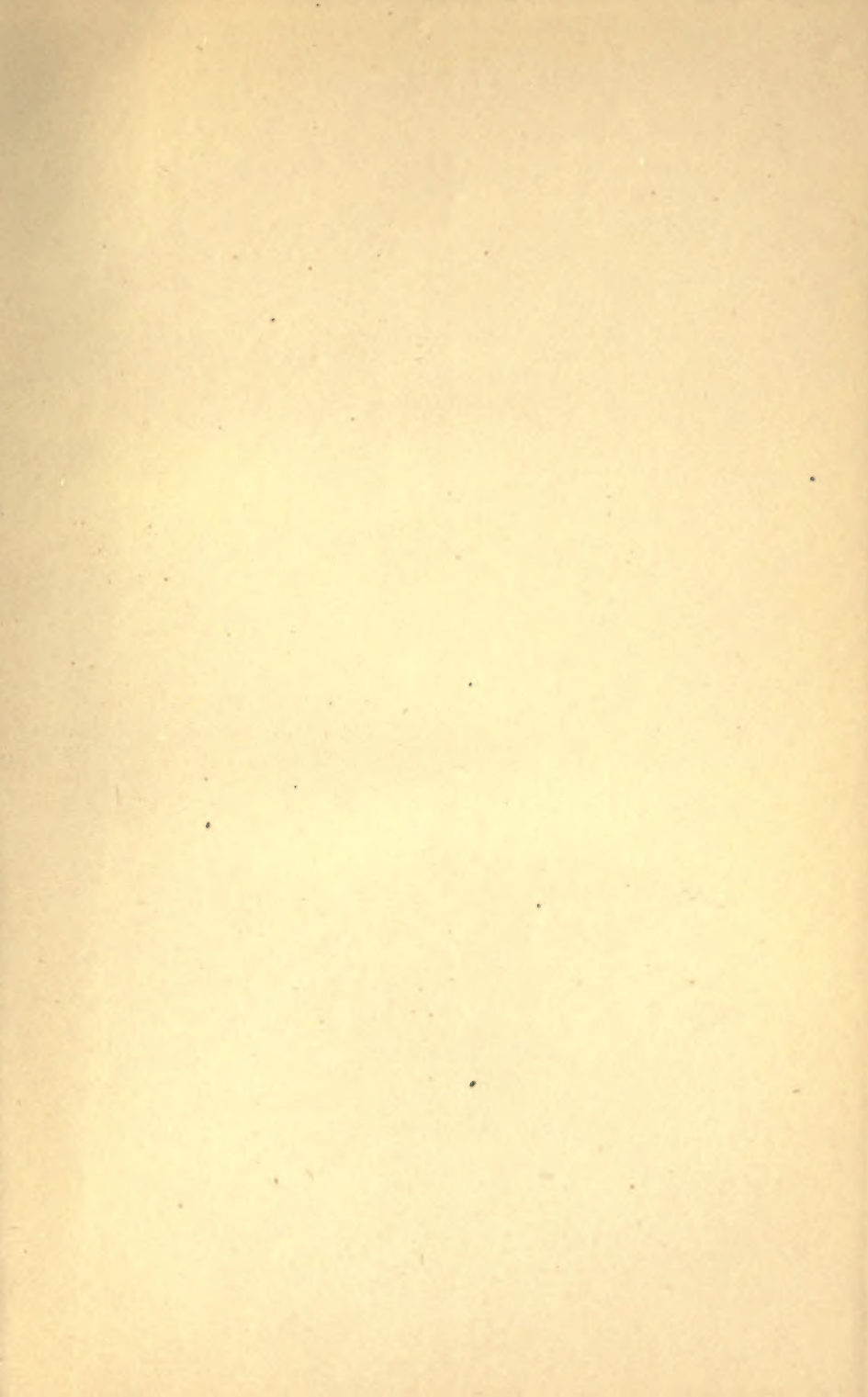
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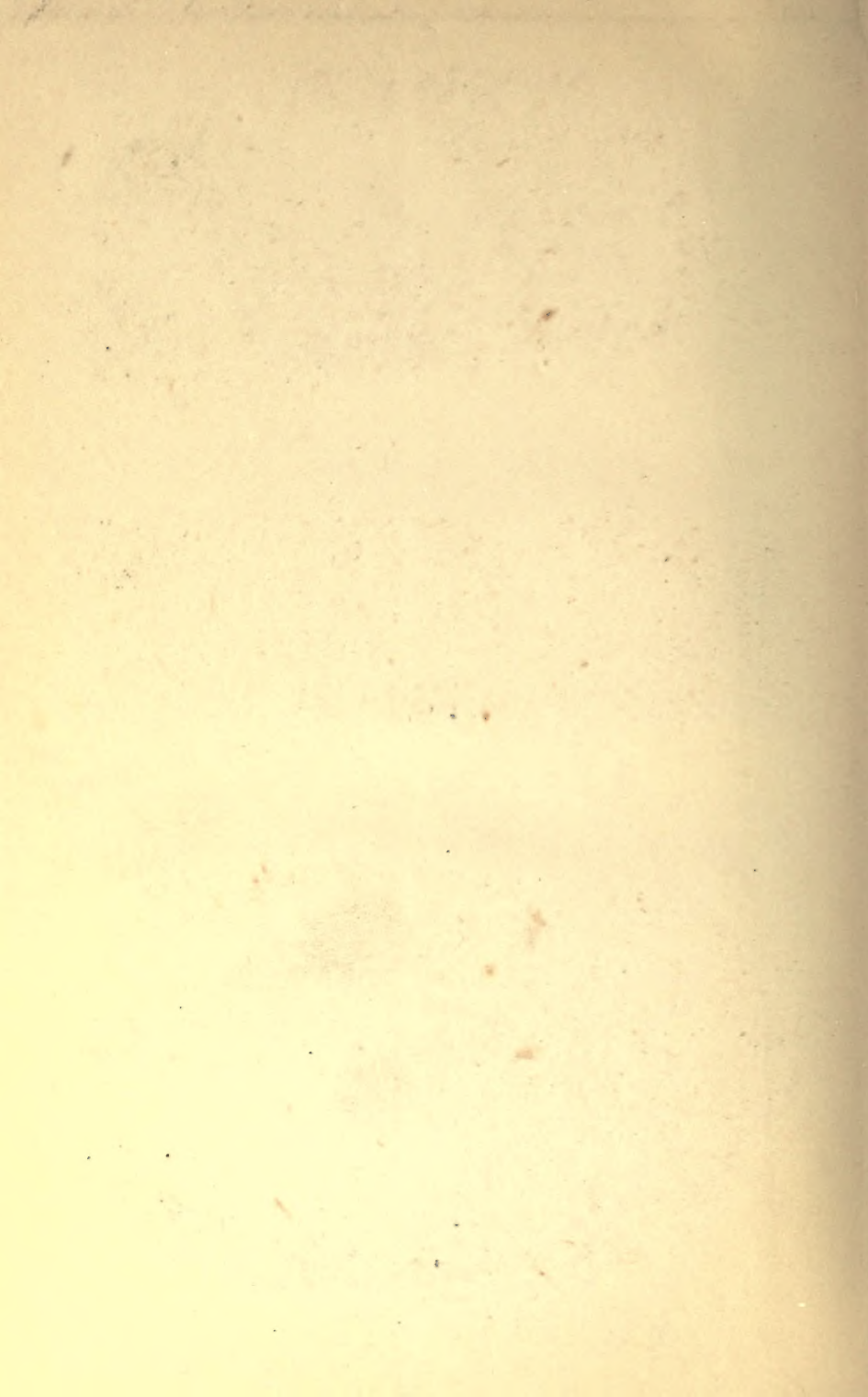
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